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CHAIRMAN'S PAGE

How to accommodate the practical need for administrative discretion with the constitutional bar against "unfettered discretion" remains a riddle of American law and government. Justice Johnson, that wise observer of our government in its infancy, remarked that

> "The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. . . . But if there is one maxim which necessarily rides over all others, in the practical application of government, it is that public functionaries must be left at liberty to exercise the powers which the people have entrusted to them." [1]

Since those halcyon days, the problem has been complicated by a then undreamed of proliferation of agencies and administrative discretion until, in the recent words of Dean Landis,

> "The scope of responsibility entrusted to these agencies is enormous, exceeding in its sweep, from the standpoint of its economic impact perhaps, the powers remaining in the Executive and the Legislative." [2]

To place some bounds upon delegations of discretion, the Supreme Court, proceeding from requirements derived from the "delegation of powers," laid down that

> "Congress can not delegate any part of its legislative power except under the limitation of a prescribed standard." [3]

Such standards, the Court indicated in a later case, constitute a bulwark against "unfettered discretion." [4]

In course of time Congress concluded that problems in many areas became "so manifold and complex" that it "had neither the time nor the capacity to handle them." So they were thrust into the hands of administrators under a standard that often

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[1] Anderson v. Dunn, 6 Wheat. 204, 226 (1821).

[2] Report on Regulatory Agencies to the President-Elect, Subcomm. on Administrative Practice & Procedure, Senate Comm. on the Judiciary, 84th Cong. 2d Sess. (Comm. Print, 1960) at p. 2.

[3] Chicago, M. & St. P.R. Co., 282 U.S. 311 324 (1931); compare Mahler v. Eby, 264 U.S. 32, 44 (1924).

[4] Panama Refining Co. v. Ryan, 293 U.S. 388, 431 (1935).

"amounted to not much more than their conception of the public interest."[5] A landmark attack on this "public interest" standard as "uncertain" was rejected in *New York Central S. Corp.* v. *United States:*[6]

> "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary."

Over the years these "standards" have proven illusory. In a brilliant, forth-coming article, Professor Arthur S. Miller,[7] takes as his thesis the

> "failure to develop acceptable and workable criteria by which the public interest may be judged and evaluated."

with the "net result" that

> "the public interest today is what a given official or agency says it is. . . ."

This is no *ipse dixit.* Mr. Justice Jackson, for example, said that the FPC "is entitled to its own notion of the 'public interest' and its judgment on policy must prevail."[8]

Thus a standard which ostensibly complies with the requirement that delegations be circumscribed has in fact become an instrument of well-nigh "unfettered discretion," a discretion which is virtually unreviewable[9] despite the Supreme Court's continued "lip service to the constitutional law of delegation of power."[10] The absence of meaningful review is the more important in that when Congress attempts to inquire whether the discretion which it has delegated is being properly exercised it can be, and it has been, met by an executive claim, under Attorney General Brownell's Memorandum to President Eisenhower, of

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[5] Landis Report, supra note 2, at p. 2.

[6] 287 U.S. 12, 24 (1932).

[7] Graduate School of Public Law, National Law Center, George Washington University, Washington, D.C.; Chairman, Committee on Policy Planning, Section of Administrative Law, ABA. Professor Miller's article is about to be published in the Journal of Public Law.

[8] Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 660 (1944) (concurring opinion); see also infra, note 9.

[9] National Broadcasting Co. v. United States, 319 U.S. 190, 224 (1943): "It is not for us to say that the 'public interest' will be furthered or retarded." Compare United States v. Bush & Co., 310 U.S. 371, 380 (1940).

[10] Miller, supra note 7.

"uncontrolled discretion" to withhold information from the Congress.[11] The opportunity thereby afforded for government without accountability scarcely requires elaboration.

Professor Miller justly points to the

> "failure of administrators to produce clear and consistent standards of the public interest after having been invested with the power and authority to do so, failure of judges and legislators to insist that administrators accomplish that task and to help them in it, and the failure of lawyers and commentators to mark and criticize that omission. . . ." [12]

Without knowledge of Professor Miller's call for action, the Section of Administrative Law early this Fall instituted its own study of what meaning has been given over the years to the phrase "public interest." A number of Committees were requested to make studies of the statutes administered by several agencies:

Committee on Aviation	Civil Aeronautics Board
Committee on Communications	Federal Communications Commission
Committee on Gas and Electric Power	Federal Power Commission
Committee on Interstate Commerce	Interstate Commerce Commission
Committee on Securities	Securities and Exchange Commission

No task force of busy practitioners can hope to make the study in depth which is patently called for. But it is hoped that the practical experience of the several committees in their respective fields will enable them to begin the task of categorizing existing *ad hoc* formulations of the "public interest" by the respective agencies, and that the pooling of agency experience may further illuminate the field. These soundings may stimulate a more thorough-going attempt to meet what Professor Miller terms

> "The fundamental need . . . for an organizing principle to guide and to gauge the exercise of discretion by government officials." [13]

On a lower, working level, the Association, given an adequate study, should be in a position to call upon the agencies to undertake rule-making proceedings for elucidation and clarification of the "public interest:" [14] and failing action it can turn to the Congress.

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[11] Reprinted as Brownell, Memorandum on Separation of Powers, 14 Fed. B.J. 73 (1954).

[12] Supra note 7.

[13] Supra, note 7.

The steadily augmenting stream of delegation, it cannot be unduly emphasized, spells a transfer

> "transfer away from the operative significance of representative government and toward the bureaucratic ascendancy of the technically competent." [15]

Add to this insulation of the delegated discretion from judicial review plus the claimed power to withhold information from the Congress and the result may well be unchecked power. The men who built our government were "above all afraid of arbitrary power," [16] they knew at first hand the truth of Acton's fine phrase "absolute power corrupts absolutely." If ever we are in danger of forgetting the axiom we need only to lift our eyes to the totalitarian excesses of the recent past.[17] The lesson of that history is that "efficient" administration may be bought at too high a price.

There are those—and Justice Johnson was among them—who believe that the remedy is to be found at the polls.[18] One hundred and forty years ago abuses of discretion could perhaps be translated into terms which an aroused electorate might correct. Today, the area of administrative discretion is so vast and sprawling, often so far removed from the immediate concern of every man, that such a translation borders on the impossible. Few are the administrative acts which can be blown up to campaign proportions. Often they are stale by the time a national campaign is waged, and are in any event lost in the swirling clash of larger issues. It is unrealistic to expect that a demonstrably erroneous and injurious application of "public interest" will arouse such public indignation as to affect the outcome of a national campaign.

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[14] Addressing the Gas industry about the FPC's objectives of providing "an assurance and predictability of outcome in as many areas as possible," Commissioner Howard Morgan recently stated that the Commission can

> "adopt statements of policy on certain recurring issues and then dispose of cases involving such issues in a uniform manner according to established policy."

Address, "Gas Price Regulation: An Optimistic View," before the West Central Texas Oil & Gas Assn., Abilene, Tex. October 19, 1961, pp. 8-9.

[15] Griffith, Congress: Its Contemporary Role, p. 2 (2d ed. 1956).

[16] Laski, The American Presidency, p. 155 (1940).

[17] See Berger, Removal of Judicial Functions From FTC to a Trade Court, 59 Mich. L.R. 199, 205, 206 (1960).

[18] Supra, note 1.

[19] Senator Carrol recently voiced the feeling that

> "there has been such a broad delegation that the Congress has in a sense lost control of the body which it has created." Hearings Before the Subcommittee on Administrative Practice & Procedure, Senate Comm. on Judiciary, 86th Cong., 2d Sess. 337 (1960).

The cure must therefore be through the formulation of criteria, in the first instance, by the agencies themselves, corrected from time to time by the Congress [19] and supervised by the courts. It is not unfair to ask whether the failure of the Supreme Court to insist upon adequate criteria of "public interest" does not foster the very "unfettered discretion" which it has declared the Constitution prohibits.

RAOUL BERGER, *Chairman*

ADMINISTRATIVE RESOLUTION OF DELAY CLAIMS IN GOVERNMENT CONTRACTS

By Kerlin J. Bragdon *

Lieutenant Colonel, JAGC

I. Scope

Delays or stand-by time suffered by contractors as a result of government action are matters of great concern to both of the contracting parties. Delays are costly, both to the Contractor who normally incurs increased costs as a result thereof and also to the Government due to a postponement of deliveries. Substantial delays frequently stem from governmental action taken under the "changes" article of fixed-price supply contracts. The scope of this discussion will center around the respective rights and obligations of the parties growing out of such delays with particular emphasis on supply contracts.

II. Preliminary Considerations

Even in the absence of authorizing constitutional or statutory provisions, the United States, as a sovereign, has the power to enter into contracts.[1] The right of the Government to contract with its citizens for supplies and services in the exercise of the governmental functions is implied in the Constitution.[2] This basic power to contract is ordinarily exercised through agents or contracting agencies who derive their authority from statutory law. Thus, the authority of these contracting agencies is fixed, and the scope thereof restricted, by statute. For example, statutory law provides that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation that is adequate to its fulfillment. . . ."[3] When the United States contracts with its citizens it is said to be acting in its contractual capacity, and the validity of its contract, the effect to be given thereto, and the rights of the parties thereunder is normally governed by the same principles that are applicable to contracts between private parties, except where the Constitution or statutory law requires otherwise. Bearing in mind, then, that the United States enjoys the same basic capacity to contract as does its citizens, and that it will acquire the same basic rights and incur like responsibilities to those resulting from contracts between private parties, let us proceed to a consideration of one of the many problems inherent in the exercise of this power to contract.

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* The opinions expressed in this article are solely the opinions of the author and do not represent the official or unofficial position of the United States Army or the Government.

[1] Dugan v. United States, 16 U.S. 172 (1818).
Van Brocklin v. Tennessee, 117 U.S. 151 (1885).

[2] United States v. Butler, 297 U.S. 1 (1936).

[3] R. S. § 3732, 41 U.S.C. § 11.

One might assume that after agreement had been reached between the parties and a contract incorporating the terms thereof had been drafted and executed, nothing remained to be done except the performance. Of course, this is literally true, but recognition must be given to the fact that more often than not problems are encountered during performance which give rise to a series of claims, disputes, or disagreements which must be resolved. The needs of the purchaser may change or other circumstances may arise requiring alteration in the plans and specifications during performance. Changed conditions, not contemplated by the parties, may be encountered. Progress of the work may be stopped or interfered with by action or inaction of the Government, such as its failure to deliver suitable material required of it by the contract, or failure to furnish it on time, or its delay in furnishing a site, or in the issuance of a notice to proceed. These, to name only a few, are circumstances creating problems during the performance period which must be solved if completion of the contract in accordance with the Government's requirements is to be accomplished. When encountered, many of these conditions give rise to claims by the contractor for increased costs resulting from the Government's action. It has long been considered that the authority of the executive department concerned, and hence of the Contracting Officer, to resolve these problems and provide for a price adjustment to compensate for increased costs occasioned thereby, must be found, if at all, within the provisions of the contract itself.[4] Mr. Robert Sheriffs Moss puts it this way:

> ". . . Taken together, the general delegation statutes and the annual appropriations provide the contracting agencies with

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[4] Phillips Electronics, Inc., ASBCA 4443 (June 1958). Buttondex Corp., ASBCA 2162 (1956).

> authority to enter into contracts. But considered together, these legislative provisions only confer authority to make payments which are lawful obligations of the United States under the provisions of a valid contract. The adherence to this idea is considered to be so important that the Congress has never seen fit to confer authority upon contracting officers which are not founded upon contractual provisions. . . ." [5]

The rule now seems firmly established that the head of an executive department, and his contracting officers and authorized representative for the settling of disputes, look to the contract itself for authority to administratively settle contract claims. Contract claims are considered as falling into two categories, one being "claims arising under the contract" and the other being "Claims for breach of contract." As to "claims arising under the contract" the executive departments assume the jurisdiction to administratively settle them; as to "claims for breach of contract" the prevailing view is that the executive departments lack the jurisdiction to grant relief. The rule apparently finds its basis in the proposition that, in the absence of an authorizing statute, an administrative official is without authority to "settle and adjust" claims against the United States.[6] A mere statement of the rule evokes inquiry as to the basis for the distinction between claims arising under the contract and those for breach of contract. Apparently this distinction is based upon the provisions actually included in the contract. If the contract contains specific provisions authorizing action by the contracting officer and requiring or justifying payment to the contractor of an equitable adjustment for increased costs incurred as a result of government action, then such payment is said to be "under the contract." [7] If there is no such contract provision, the claim is generally considered to be one for damages for breach of contract. Thus, by including clauses in the contract which cover the various situations giving rise to claims and providing for equitable adjustment thereof, a claim which would be one for breach of contract and not subject to administrative settlement may be converted into one arising under the contract and the subject of administrative adjustment. It would seem to follow that, if the executive departments can accomplish this result by such a simple expedient, their failure to administratively settle these so-called damage claims for breach of contract cannot properly be predicated upon any lack of jurisdiction for, without the jurisdiction, there would be no authority to insert the clauses in the contract in the first place. It would rather appear that inherent jurisdiction is vested in the executive departments to administratively settle *all* contract claims, and that the heads of such executive departments have elected to renounce the exercise thereof in specific areas, reserving for the courts or other authority the settlement of claims arising in such areas. The heads of the executive departments in withholding authority to include contract provisions governing situations arising in such reserved areas, have effectively precluded their contracting officers and authorized representatives for the settlement of disputes from acting.

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[5] Robert Sheriffs Moss, Settlement of Contract Claims—Authority of the Contracting Officer, 1 Gov't Contracts Rev., 2-5 (February 1957).

[6] Smith, *The War Department Board of Contract Appeals*, 5 Fed. B.J. 74 (1943).

[7] Speck, *Delays-Damages on Government Contracts: Constructive Conditions and Administrative Remedies*, 26 George Washington Law Review 505, 550 (1958).

Mr. Joel P. Shedd, Jr., a member of the Armed Services Board of Contract Appeals, has fully considered this question of administrative authority to settle claims in a very comprehensive article, from which is quoted, in part, as follows:

> "At the present time a distinction is made in contract administrative law between "claims arising under the contract" and "claims for breach of contract," and the thought is that the executive departments somehow have jurisdiction over claims "arising under the contract," but do not have jurisdiction over claims for breach of contract. There is no statute which makes such a distinction or which says in so many words that the department or agency charged with the administration of a contract has authority to settle or act on claims arising under the contract, any more than there is a statute saying that the department or agency does not have authority to settle a claim for breach of the contract. * * * What is a claim arising under the contract? This concept, not based on statute or judicial decision, but recognized in procurement law circles, is as follows: Whenever a payment to a contractor is required by or can be justified under the provisions of the contract, such payment is "under the contract" and is not damages for breach of contract, regardless of whether the amount to be paid is liquidated or unliquidated. Payments "under the contract" include the contract price, together with any adjustments provided for in any escalation or price revision clause and the "Changes," "Changed Conditions" and other provisions of the contract expressly providing for the making of price adjustments. Action taken by the contracting officer is under the contract if the

> contract expressly provides for the taking of such action, but if the contracting officer asserts a valid legal claim against the contractor which is not expressly provided for in the contract, he is asserting a claim for damages. * * * The test of what claims can be settled administratively as claims arising under the contract is: You can if you say in the contract that you can. It is a process of lifting yourself by your own bootstraps." [8]

While the validity of the reasons given for the failure of the executive departments to administratively settle so-called damage claims for breach of contract may be questioned, nevertheless it must be recognized that the rule is an established one, followed by the Armed Services Board of Contract Appeals and recognized by its Charter. As a matter of fact, the concept has so long been prevalent in connection with Government contracts that avoidance of the ill effects thereof has been accomplished by circumvention rather than repudiation. The tendency over the years has been to add more and more contract clauses invading the reserved area and converting what had been considered "damage claims for breach of contract" under the concept to "claims arising under the contract." Generally, these added clauses have authorized the Contracting Officer to take certain actions and have provided for administrative settlement of contractor claims for increased costs resulting therefrom.[9] Mr. Shedd, at page 515 of his article cited *supra,* says this:

> "In recognition of the manifest desirability of settling claims at the administrative level and saving both parties the expense of litigation, the executive departments have endeavored to convert contract claims from claims for breach of contract into claims arising under the contract by the insertion of contract clauses covering various situations that give rise to claims and by giving a broad interpretation to contract clauses, in order that they may be used as vehicles for settling meritorious claims at the administrative level."

The progress in this respect probably reached a peak during World War II. As indicative of this, there is quoted below from the published record of a presentation by the Section of Administrative Law of the American Bar Association upon the subject, *"Demonstration of a Board of Contract Appeals Case."* That quotation, appearing in the Introduction of such presentation, reads in pertinent part, as follows:

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[8] Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts,* 27 George Washington Law Review, 481, pp. 511-514.

[9] Moss, page 7, *supra,* footnote 5.

> " * * * with the impetus of World War II contracting, significant developments in the form of Government contracts and in the administrative settlement process occurred. The uniform termination article made its appearance. This resulted in the adoption of an amended form of default article providing that if the contracting officer found, after termination for default, that the contractor's default was due to conditions beyond his control and was without fault or negligence on his part, the termination would be treated as one for convenience. Contract articles were drawn to cover a variety of disputes which might arise during performance. Some of them authorized an equitable adjustment in the contract price for delays occasioned by Government action. In the construction field, default articles gave the contracting officer the power to either assess liquidated damages for delay or to terminate the contractor's right to proceed. Pricing problems under negotiated contracts led to the adoption of price redetermination articles. The cost-plus-a-fixed-fee contract appeared on the scene and complicated rules for determination of cost were developed. Slowly but inexorably the area within which breaches of contract could occur were narrowed. More and more of the disputes which might arise during performance were covered by a contractual provision. Disputes arising in all of these areas were covered by the disputes article. Those which could not be settled by agreement were thus subject to decision by the contracting officer and appeal to the Secretary or his duly authorized representative."

Under the rule and concept hereinbefore discussed, the contract articles included in government contracts in most instances provide the authority for the contracting officer to administratively settle claims of contractors for increased costs resulting from action or nonaction of the Government described therein. When coupled with the "Disputes" article, normally included in all government contracts, an appeal is provided from the decision of the contracting officer to the head of the executive department or his authorized representative, which is the Armed Services Board of Contract Appeals for the Secretaries of the Army, Navy and Air Force. The major area not yet fully covered by a contract article for supply contracts authorizing administrative settlement is that represented by claims of contractors for increased costs resulting from *delay or stand-by time* suffered as a result of government action under the "Changes" article of the contract. That being the subject of this paper, let us proceed to a consideration thereof.

III. Discussion

The delay and stand-by time with which we are concerned in this discussion is that resulting from action by the Government under the "Changes" article of the fixed price supply contract. A "Changes" article prescribes the method by which drawings, designs, or specifications of the purchased product are changed after the award of the contract but before completion of performance. Some form of "Changes" article has been known in government contracting for many years.[10] Accomplishment of the governmental mission as doubtless been greatly influenced by inclusion of a "Changes" article in government contracts. This is so simply because of the changing world we live in. A "Changes" article would be of little value if the requirements and needs of the parties never changed. However, the necessity for changes in the item being produced is as often the rule as the exception, whether it be a gun, an article of clothing, complex technical equipment, a building, or a service. It may develop in performance that the specifications of the end item as set out in the contract are erroneous so that the product resulting will be inefficient or perhaps incapable of the use for which it was intended. New technological developments or break-throughs may make the end item originally conceived obsolete before it is produced. Changing requirements may suggest modification of the product during manufacture to one better calculated to meet the need. Circumstances may require the alteration of a building or its location in a different place. These are only a few of the many situations which might arise after award and during performance of the contract which would require adjustment. If the changing conditions served to eliminate the need for the purchased item, the problem could be reached through cancellation or termination of the contract for the convenience of the Government. However, if the need for the item procured continues, but in a modified or changed form, some other solution must be found. While some situations might arise that would lend themselves to a termination for convenience and a reletting of the contract (and, of course, this would have to be done if the change in the item required was so comprehensive that it amounted to a new item not within the scope of the contract), such a procedure would in most cases be cumbersome, expensive, inadequate, and of doubtful legality. For many years now, the solution to this problem has been accomplished in Government contracts through the medium of the "Changes" clause.

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[10] McCord v. United States, 9 Ct. Cl. 155 (1873).

The "Changes" clause currently prescribed for use in Government fixed-price supply contracts is found in a revision by General Services Administration of Standard Form 32, "General Provisions (Supply Contract)" as Clause 2 "Changes." This revision of Standard Form 32 was published in October 1957 and alters the "Changes" clause to require an equitable adjustment whenever the changes increase or decrease the cost or time of performance of "any part of the work under this contract, whether changed or not changed by any such order." [11]

This clause was prescribed for use in Armed Services Contracts subsequently awarded by Armed Services Procurement Regulation, Change No. 28 (28 January 1958), effective 1 April 1958. This new clause may eliminate, for changes in supply contracts, some of the previously imposed limitations upon administrative settlement of claims arising thereunder; however, it must not be assumed that easy or even complete solutions are provided by the new clause, and others like it, if put into general use.[12] The use of this new "Changes" clause, having been authorized only a little over three years ago, disputes arising thereunder have not yet reached the Armed Services Board of Contract Appeals in any significant number (see footnotes 43 and 44, *infra*). By the same token, and in view of the time lag normally existent between the award of a contract and final disposition of disputes arising thereunder by the Board, it is clear that for some time yet to come the problems incident to disputes under the "Changes" article previously prescribed and included in contracts entered into prior to 1 April 1958 will largely be the subject of consideration by the Board and the Trial Attorneys presenting cases before it. This presentation primarily concerns itself with the problems generated by the disputes arising under the previous "Changes" clause, respecting which a considerable body of law has grown up.

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[11] Clause 2, "Changes" of Standard Form 32 (October 1957 Edition), prescribed by General Services Administration Regulation I-II-209.00, (FPR 1-16, 901.32; ASPR 7-103.2 reads as follows:

"2. Changes:

> "The Contracting Officer may, at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and, (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed."

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[12] Speck, pp. 562-3, *supra* footnote 7, from which the following is quoted:

"The problems posed by these recent proposals could fill another article, and these new clauses, if put into use, cannot be expected to provide easy or even complete solutions. Two problems—one primarily administrative and one legal—stand out. The administrative problem is that of disentangling the costs arising out of the Government's action or inaction or its changes from the costs of improvident bargains, the contractor's negligence, his mismanagement, or perhaps merely his unfortunate decisions. When the work proceeds generally successfully and profitably for the contractor, little difficulty may be encountered in isolating the costs attributable to the Government delay; but when the work is faltering and heavy losses have been incurred or are anticipated, the contractors must be expected to attribute, rightly or wrongly, the larger share of the loss to the Government's changes or delays, perhaps minor, occurring simultaneously with other delays for which the contractor or neither party is responsible, it will be easy to make plausible claims that increases in wages or material costs, prolonged rentals and overhead, and additional or more difficult work, are all the responsibility of the Government. At least some of these higher costs have usually been anticipated in contingency allowances or over-generous estimates. On complicated jobs reviewed long after the events it is usually impossible to allocate costs even approximately.

The possible disparity between the minor nature of the changes or other Government delays in themselves and the huge costs alleged to result from them in the contractor's operations raises the legal problem of how these costs are to be paid from limited appropriations. A series of statutes, some with criminal penalties, forbid expenditures or obligations to expend in excess of appropriations. An elaborate system of apportionments and allotments has been established to insure control of expenditures within the limits of appropriations. A contracting officer ordering a change in the work can be held responsible for estimating within reasonable limits the costs of bricks and mortar, labor and hardware, etc. directly involved so that he can insure sufficient appropriated funds to meet these costs; but if such an order simultaneously imposes contractual obligations chargeable to the same appropriation for delays, interruptions, and interferences with other contract work which multiply these work costs many fold, which the contracting officer cannot anticipate, and which will not be disclosed until months or years after the events, appropriation limits may often be exceeded."

The "Changes" clause with which we are primarily here concerned, and under which disputes have arisen which are still the subject of current consideration by the Armed Services Board of Contract Appeals and the Trial Attorneys practising before it, appears as clause 2 of Standard Form 32, "General Provisions (Supply Contract)," prescribed by General Services Administration, November 1949 Edition, and reads as follows:

> "2. CHANGES
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> The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, with the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the costs of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: Provided, however, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed."

This standard clause was prescribed for use in Department of the Army fixed-price supply contracts, and was utilized without any change material to the question of equitable adjustment of claims for delay and standby time, until 1 April 1958. Some form of "Changes" clause containing substantially the same provisions as the one quoted above, and without distinction insofar as the rights of the parties respecting delay or standby claims are concerned, has been utilized in government contracts as far back as Civil War days. So, for all practical purposes and insofar as claims for delay and standby time are concerned, the "Changes" clause quoted *supra* in the body of this paper is the one with which we are concerned here. Except as otherwise specifically indicated, the court decisions and decisions of the Armed Services Board of Contract Appeals cited and discussed *supra* and *infra* in this paper all dealt with the quoted "Changes" clause, or a clause of like import with no differences that are material to the problem being discussed. Thus, the principles announced in the cited decisions are applicable to our consideration of the respective rights of the contracting parties under the provisions of the quoted "Changes" clause.

As we have already seen, officers and authorized representatives of executive departments of the government will entertain and settle administratively "claims arising under the contract," but that they are not authorized to nor will they entertain and settle claims for "damages for breach of contract." [13] We have also considered the basis for distinction between the two types of claims, finding that where payment of the claim to a contractor is required or can be justified under a specific provision or provisions of the contract it is a "claim arising under the contract," whereas in the absence of such a contract provision the claim is treated as one for "damages for breach of contract." [14] Payment of claims for delay or standby time will require reckoning with these rules. Application of these rules will require that authority be found within the specific provisions of the contract for the payment of delay claims if they are to be settled administratively as "claims arising under the contract" rather than in the courts as "claims for damages for breach of contract."

The delays giving rise to the claims we are considering have occurred in all types of contracts—construction contracts, supply contracts, and contracts for services—but the type of contract has, until recently, usually not been significant in view of the similar clauses involved. The wide variety of the delays encountered and the nature of the costs claimed to have resulted can well be illustrated by quoting from a comprehensive article on the subject by Mr. William H. Speck [15] wherein he reports the results of an exhaustive study in the following language:

> "The most common kinds of delay have been stoppage of work by Government order; the failure to have the site or structure ready for the contract work; delay in furnishing materials, equip

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[13] *Supra,* footnotes 4, 5, and 6; Speck, pp. 645-50, *supra* footnote 7.

[14] Speck, pp. 550-558, *supra* footnote 7; Shedd, *supra* footnote 8.

[15] Speck, pp. 520-522, *supra* footnote 7.

> ment, instructions, or other prerequisites of the contractors' performance; changes ordered by the Government; and procrastination in making decisions necessary so that the work could proceed. Less common causes of delay have been technical difficulties, changed conditions, alleged abuses of Government discretion, defective plans and specifications, interference by other contractors or by the Government's occupancy of or activities upon the site, postponed notices to proceed, so-called "sovereign acts," and delayed tests and inspection. * * * The most common costs are merely those arising from the continuation of expenses over a longer period of performance: overhead, rentals, supervision, maintenance, interest, bond and insurance premiums, and idleness and underemployment of facilities, equipment and work forces. Some costs result from the necessity of performing the work under less advantageous conditions than would have been encountered but for the delay: in winter weather, in a period of higher prices for labor or materials, without the skilled workmen or advantageous bargains available earlier, or by more expensive modes of operation. Some costs merge into actual extra work, which, as will be shown, may seem to have a bearing on whether administrative payment can be made: restoration of materials and equipment; storage, preservation, and protection during delay; starting and stopping operations; longer heating and pumping; temporary stopgap work; extra handling or moving of equipment and material; and more travel. Some damage claims abandon attempts to isolate items and simply demand costs incurred plus profits, the difference in costs, or the increased value of the work as performed. Claimants have also sought to be made completely whole by recovering the costs of proving claims and profits."

Since we must find the authority within the provisions of the contract itself for executive officers of the government to administratively settle and pay delay claims as ones "arising under the contract," let us examine the contract clauses normally required and included in government contracts. Army construction contracts will be first considered since they usually include two clauses, "Changed Conditions" [16] and "Suspension of Work" [17] not normally, found in supply contracts. The current "Changes" clause for construction contracts is Clause 3 of the General Provisions of the Standard Form of Government Construction Contract (Standard Form 23-A; April 1961 Ed., Ct. S.A.)[18] This i substantially the same as the previous clauses used in constructio contracts. Insofar as the "Changed Conditions" clause is concerned, it is clear that no authority is contained therein for th payment of delay costs. In the appeal of *Roy C. Ek,*[19] the Arme Services Board of Contract Appeals said:

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[16] Standard Form 23A, April 1961, "General Provisions," Clause 4; Ct. S.A.; Fed. Proc. Reg. (41 CFR) 1-16.401.

[17] Clause GC. 11, General Conditions, Army Engineer Construction Contracts; AFPI 7-3016.12 (15 Nov. 1957).

> " * * * In other words, Appellant seeks damages for delay suffered in the performance of obligations which were not diminishe or varied by the alleged unknown condition or the order to stan by. We are of the opinion that such a claim is one for damage for delay amounting to breach of contract beyond the jurisdictio of the Board under the 'Disputes' article of the contract. As th Board observed in *Tucker McClure,* ASBCA No. 193, decided 3 August 1950, the 'Changed Conditions' article is not a mechanis for the adjustment of damages for delay. In this respect, th 'Changed Conditions' article is similar to the 'Changes' article See *Chas. H. Tompkins Co.,* ASBCA No. 306, decided 24 Februar 1950; *Chas. H. Tompkins Co.,* ASBCA No. 570, decided 27 Apri 1950; *Globe Building Materials Company,* ASBCA No. 770 (decided 14 March 1952; *Bishop Manufacturing Company,* ASBC No. 2141, decided 23 January 1956 (Motion for Reconsideration) *Allison Honer Company and Cox Bros. Construction Co.,* ASBC No. 2519, decided 31 January 1956; *Farnsworth & Chambers Co. Inc.,* ASBCA No. 3061, decided 29 February 1956; *Du-Wel Meta Products, Inc.,* ASBCA No. 2977, decided 29 June 1956."

This case was cited with approval in the appeal of *Intermountai Company.*[20] The "Suspensions of Work" clause, however, doe provide for equitable adjustment for unreasonable delay unde the specific conditions set out in the clause. Thus, inclusion o a "Suspension of Work" clause in Army construction contracts has the effect of converting a contractor's claim for the delay contemplated therein from a claim "for damages for breach of contract" to a claim "arising under the contract" and making it a proper subject for administrative settlement. The scope and effect of the "Suspension of Work" clause when included in Army construction contracts as a vehicle for administrative payment of a delay claim is the subject of a recent article written by Mr. O. P. Easterwood and an outline and collection of authorities by Mr. E. Manning Seltzer[21] to which the reader is referred for further discussion. Army construction contracts which do not include the "Suspension of Work" clause are no different insofar as delay claims are concerned than supply contracts, it having been held that the "Changes" and "Changed Conditions" clauses in construction contracts are not materially different than the "Changes" clause in supply contracts.[22] However, a new clause "Price Adjustment for Suspension, Delay, or Interruption of the Work" was authorized on 26 January 1960 for Government-wide use on an optional basis effective 1 July 1960.[23] This clause is to be inserted

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[18] Fed. Proc. Reg. (41 CFR 1-16.401). It reads: "3. CHANGES. The Contractin Officer may, at any time, by written order, and without notice to the sureties, mak changes in the drawings and/or specifications of this contract if within its genera scope. If such changes cause an increase or decrease in the Contractor's cost of, o time for, performance of the contract, an equitable adjustment shall be made an the contract modified in writing accordingly. Any claim of the Contractor fo adjustment under this clause must be asserted in writing within 30 days from th date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final paymen under the contract. If the parties fail to agree upon the adjustment to be mad the dispute shall be determined as provided in Clause 6 of the General Provision but nothing provided in this clause shall excuse the contractor from proceedin with the prosecution of the work as changed. Except as otherwise provided i this contract, no charge for any extra work or material will be allowed."

[19] *Roy C. Ek,* ASBCA No. 3096, 56-2 BCA 1032 (1956).

[20] *Intermountain Company,* ASBCA No. 4693, 58-2 BCA 2024 (1958).

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[21] Easterwood, *Pay for Delay,* 1 Government Contracts Review 1-5 (January 1957); Seltzer, *Delays under Construction Contracts,* p. 13 ff. of An Institute on "Some Practical Aspects of Government Construction Contract Law," sponsored by the Federal Bar Association and Fordham University School of Law; see also Speck, pp. 558-559, *supra* footnote 7.

[22] *Supra,* footnotes 18 and 19; see also *infra, Anderson,* footnote 31 (b), pp. 143-144 and footnote 31(c), page 30.

[23] FPR 1-7.602-1 (25 Fed Reg 648) APP 7-1501; ASPR 7-604.3. It reads as follows: "The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

> "If, without the fault or negligence of the Contractor, the performance of all of any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made if, and to the extent that, performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated is asserted in writing as soon as practicable after termination of such suspension, delay, or interruption but not later than the date of final

in construction contracts wherever it is desired to provide fo suspension of work for the convenience of the Government or t provide for administrative relief for unreasonable periods of dela caused by the Contracting Officer in the administration of th contract.[24] A "Government-Furnished Property" clause[25] is authorized for use in Armed Forces Contracts in appropriate cases Under this clause an equitable adjustment is provided for dela of the Government in delivering materials required of it unde the contract under limiting conditions contained in the claus itself. It has been held that this clause operates to convert dela claims in connection with Government-Furnished Property fro damage "claims for breach of contract" to "claims arising unde the contract" and to permit administrative settlement to a limite extent.[26] The clauses mentioned above are the only clauses speaking of delay, as such, which have normally been included in Arm contracts. As is pointed out, the relief provided in those clause for administrative settlement of delay claims is, particularly unde supply contracts, limited in scope and confined to specific situations. The great bulk of delay claims remain outside the coverag of contract clauses. The only remaining contract clause utilize in Army supply contracts that offers any potential as authorit for administrative settlement of delay claims is the "Changes' clause. Let us now proceed to an analysis of it.

While we are not so much concerned in this paper with th rules of substantive law determining which items of higher cost

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payment under the contract. Any dispute concerning a question of fact arisin under this clause shall be subject to the Disputes clause."

[24] *John A. Johnson & Sons, Inc.*, ASBCA No. 4483, 59-1 BCA 2088 where it wa concluded that the clause was designed not to transfer to the Government all risk incident to the delay, but rather to provide a contractual basis for compensatin a contractor for delays caused by the Government in its contractual capacit which because they unreasonably delayed the progress of the work there resulte additional expenses and losses not reasonably anticipated by the contractor at th time it entered into the contract and the risk of which it had not assumed. See als *Daniel J. Cronin, Inc.*, ASBCA No. 4044, 58-1 BCA 1767; *Norair Egineering Corp* ASBCA No. 3527, 57-1 BCA 1283, and authorities cited therein; *Lenry, Inc.,* *William P. Bergan, Inc.*, ASBCA No. 4674, 58-2 BCA 1849; *T. C. Bateson Construction Co.*, ASBCA No. 5492, 60-1 BCA 2552, and authorities cited therein; see also discussion of similar proposed clauses (Ms. Comp. Gen. B-127764, 11 Oct. 1956) 36 Comp. Gen. 302; Ms. Comp. Gen. B-127743, 3 Oct. 1956.

[25] 32 CFR § 13.502 (1954); ASPR 7-104.24.

[26] *The Foster Company*, ASBCA No. 2575 (1955); *Glove Crayon Co.*, ASBCA N 2562 (1955); *Cornelia Garment Co.*, ASBCA No. 1673 (1954); *Carteret Work Uniform* ASBCA No. 1015 (1952); *McGrath and Co.*, ASBCA No. 1948 (1954); *The Foster Co* ASBCA Nos. 975, 976, 1225 (1952).

generated by delay are recoverable as damages, we are interested in those rules insofar as they affect the authority of executive officers of the government to administratively settle and pay claims for delay. Among others, there are four famous cases in which the Supreme Court of the United States has considered and interpreted the "Changes" clause as a vehicle for payment of delay claims. In *Chouteau* v. *United States,*[27] the contract involved the construction of a naval war vessel. A "Changes" clause was included therein which permitted the Government to make "alterations and additions to the plans and specifications" and provided for payment at fair and reasonable rates "if said alterations and additions should cause extra expense." Completion of the contract was required in eight months, but, due to delays resulting from a series of changes and alterations in specifications ordered throughout the period of performance, the construction period was considerably extended and final delivery of the vessel was substantially delayed. Except for the delay generated by changes in the work the contract would have been completed within the contract time. During the delay, prices of labor and materials increased and the Contractor sought to recover in its claim this increased cost. The Court of Claims denied the claim and, upon appeal of the Supreme Court, the claim was likewise denied in this language:

> "It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they deemed necessary for the protection of each party. For the reasonable cost and expense of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made. There was a provision for delay, by which the contractor was to submit to pay $4,500 for every month of that delay. This provision, the only one on the subject, if strictly enforced, might have made him a still greater loser; but it seems to have been waived. But we are very clear that, without any such provision, he must be held to have taken the risk of the prices of the labor and materials which he was bound to furnish, as every other contractor does who agrees to do a specified job at a fixed price. It is one of the elements which he takes into account

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[27] Chouteau v. United States, 95 U.S. 61 (1877).

> when he makes his bargain, and he cannot expect the other part to guarantee him against unfavorable changes in those prices."[2

Thus, the Supreme Court in 1877 expressly interpreted th "Changes" clause as permitting payment for the reasonable cost o the work changed, but not for increased cost of unchanged work the said clause making no provision therefor.

The doctrine of the *Chouteau* case was followed in 1926 i *Crook Co.* v. *United States*[29] wherein the court specifically addressed itself to the question of payment for delays. In this case a heating contractor was delayed almost a year beyond the dat fixed in the contract for performance due to the failure of th building contractor to finish construction of the building in whic the heating plant was to be installed. The claim of the heatin contractor for increased cost due to this delay was denied by th Supreme Court in 1926 in the following language:

> "But the only reference to delays on the Government side is i the agreement that if caused by its acts they will be regarded a unavoidable, which through probably inserted primarily for th contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do Delays by the building contractors were unavoidable from the poin of view of both parties to the contract in suit. The plaintiff agree to accept in full satisfaction for all work done under the contrac the contract price, reduced by damages deducted for his delays an increased or reduced by the price of changes, as fixed by the Chie of the Bureau of Yards and Works. Nothing more is allowed fo changes, as to which the Government is master. * * * Th plaintiff's time was extended and it was paid the full contrac price. In our opinion it is entitled to nothing more."[30]

Thus, the doctrine was announced that the "Changes" articl makes no provision for payment of delay claims occurring as result of another contractor's failure.

We come now to the case of *United States* v. *Rice*[31] which i undoubtedly the most famous and the most cited case on th subject. Here there was involved a contract requiring one contractor to install equipment in a building being constructed b another contractor. The building contractor was delayed b

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[28] *Supra,* footnote 24, page 68.

[29] Crook Co. v. United States, 270 U.S. 4 (1926).

[30] *Supra,* footnote 26, pp. 6-7.

[31] United States v. Rice, 317 U.S. 61 (1942).

change in the specifications, which in turn delayed the equipment contractor who sought in addition to the time extension granted, recovery for overhead costs accumulated during the delay and decreased labor effectiveness from performance in cold weather rather than in warm weather. In denying the claim the Supreme Court observed that, the Government having specifically reserved the right to make changes, delays incident to such changes cannot amount to a breach of contract: The Court said further:

> " * * * It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease . . . in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision."

Note that the Court expressed agreement with the view urged by the Government:

> " * * * that the change in specifications resulting in delay was not a breach of the contract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the Government was required to do no more than grant an extension of time. Put another way, the Government concedes that, if an alteration of plan required respondent to use an extra 50 tons of steel, the Government would be liable for the value of the steel and the cost of installation; but it argues that under the terms of this contract an extension of time should be accepted as full equitable adjustment for all damages caused by the fact that the work was done at the later period made necessary by the permitted change."

Here then, in 1942, we find the Court citing with approval the doctrine announced 65 years earlier in the *Chouteau* case, *supra,* and 20 years earlier in the *Crook* case, *supra,* that the "Changes" clause of government contracts did not cover delays nor authorize the payment of damages for delay claims, the contractor being entitled only to an extension of time.

In *United States* v. *Howard P. Foley Company,*[32] the contract involved required an electrical contractor to install an airport lighting system. The contractor was delayed in its performance because runways became available only irregularly and after long delays. The award by the Court of Claims to the contractor of judgment for overhead and administrative expenses during th delays was reversed by the Supreme Court. In commenting upo the *Crook* and *Rice* cases, *supra,* the Court said:

> " * * * The pertinent provisions in the instant contract are, i every respect here material, substantially the same as those whic were held in the former cases to impose no obligation on th Government to pay damages for delay. * * * The contract reserved a governmental right to make changes in the work whic might cause interruptions and delay * * * This contract, like th others, shows that changes and delays were anticipated and provided for. The question on which all these cases turn is: Did th Government obligate itself to pay damages to a contractor solel because of delay in making the work available? We hold agai that it did not for the reasons elaborated in the *Crook* and *Ric* decisions.

The Supreme Court cases cited and discussed *supra* were considering "Changes" articles which, insofar as the right of th contractor to recover for delays experienced in the work, did no materially differ from the standard "Changes" clause for fixe price supply contracts quoted above in the body of this paper. I each instance, the Court concluded that the "Changes" claus reserved to the Government the right to make changes and authorized an equitable adjustment for any increase in cost of th changed work and an extension of time to compensate for an delay occasioned thereby. The Court expressly repudiated an idea that claims for additional costs resulting from *delay* wer recoverable under the "Changes" article. In the cited cases th Supreme Court went further and announced what the Court o Claims apparently considers to be a harsh rule—that is, that th costs of the delay experienced were not recoverable in any event In reaching this conclusion, the Court, after examining the contracts involved in each instance, and the plans and specifications determined that there was no promise, and none was implied that the Government would perform its obligations so as to permit the contractor to complete on time and without delay; tha the parties to the contracts did in fact contemplate and provid for delays in including the "Changes" clause permitting alteratio in the specifications and an extension of time for any dela occasioned; and that the Government had not breached an

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[32] United States v. Foley, 329 U.S. 64 (1946).

contract obligation by causing the delays, was not liable for such delays in the absence of some contract provision expressly assuming responsibility, and that the "Changes" clause only provided for payment of the costs of the changes themselves and *not for the costs of delay* or increased costs of the unchanged work. In deciding these cases and determining that there had been no breach of contract, and consequently no liability on the part of the Government for delays, some emphasis was placed upon the absence of fault on the part of the Government. The question of an unreasonable delay, as such, was not discussed. The Court of Claims, faced with the doctrine announced by the Supreme Court and being reluctant to apply what it obviously considered to be a harsh rule, seized upon the fact that the Supreme Court had emphasized the lack of fault on the part of the Government in connection with the delays. As a result, the Court of Claims, while accepting the basic legal concepts expressed by the Supreme Court, developed its own doctrine under which it could make awards to contractors *by way of damages.* In support of its doctrine, the Court of Claims placed great emphasis upon "fault" of the Government in "unreasonably" delaying the work and other circumstances such as "willful and careless delays." These matters affect the *ultimate liability* of the Government for delays occurring in connection with Change Orders, a question which, of course, is of paramount importance in the final analysis, but need not be discussed here as our inquiry is directed towards the authority of the executive officers of the Government—the Contracting Officer, and the Armed Services Board of Contract Appeals primarily—to entertain and administratively settle delay claims. Suffice it to say that the Court of Claims in appropriate cases involving delay claims will find the Government liable therefor *by way of damages.*[33] The decisions of the Court of Claims have not been entirely consistent and to reconcile them sometimes is difficult. The reason for this appears primarily to be the difficulty had with application of what the Court of Claims obviously considered to be the harsh rules laid down by the Supreme Court. A comprehensive and full discussion of these matters and the circumstances under which the Court of Claims will fix liability upon the Government for delay claims is found in three law review articles,[34] to which the reader is referred.

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[33] F. H. McGraw & Co. v. U.S., 131 CtCl 501, 130 F. Supp. 394 (1955).

[34] Speck, *Delays—Damages on Government Contracts: Constructive Conditions and*

As noted *supra,* while the Court of Claims has developed it own theories under which it will deny or grant to the contracto awards in connection with claims for delay, it is nevertheless tru that the Court of Claims has accomplished this while followin the legal concepts announced by the Supreme Court. Thus, i both the Supreme Court decisions and the decisions of the Cour of Claims, we find it well established from principles therei announced that the standard "Changes" clause, whether it b the version included in fixed-price supply contracts, or that utilize in construction contracts, provides no vehicle for the Contractin Officer or the Armed Services Board of Contract Appeals to entertain and administratively settle claims of contractors for delay Bear in mind that the "Changes" clause, as interpreted by th Courts as aforesaid, reserves the right in the Government t change the specifications. If this right is reserved, then clearl the right to take the necessary time to make the changes is included. It is further clear that the clause itself contemplates tha there will be delay if changes are made, for it specifically provide relief for such delay through the medium of an extension o time. And finally, the law is well settled that the "Changes" clause authorizes an equitable adjustment only for changes in th work itself and that, for unchanged work or delays occurring i connection with the change, no relief is provided since the clai is outside of the terms of the contract. This, as we discussed i the beginning, puts the claim in the category of one for damage for breach, not cognizable by the executive officers of the Government, nor subject to administrative settlement, but one ove which jurisdiction is reserved for exercise by the Courts. If such delay claim is payable at all, it is payable as a damage claim an the fixing of liability therefor upon the Government is accomplished through resort to the Courts in the absence of some othe specific contract clause authorizing administrative settlement. I is in this legal climate that we consider the decisions of the Arme Services Board of Contract Appeals.

In the appeal of *Pressed Steel Car Company, Inc.,*[35] a fixed-pric supply contract for boxcars was involved. The Contracting Office

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Administrative Remedies, 26 George Washington Law Review, 505, 518-546 (Apri 1958); Anderson, *Damages for Delays in the Law of Government Contracts,* 2 So. Calif. L. Rev. 125 (Feb. 1948); Anderson, *Changes, Changed Conditions an Extras,* 42 Ill. L. Rev. 29 (1947-8).

[35] *Pressed Steel Car Co., Inc.,* ASBCA Nos. 2450, 2455, 2432 (June 1955).

directed the contractor to stop all wheel and axle assembly while the design of the wheels was studied. The contractor, at the time, had on hand 2,000 wheels which had been burnished and coated with *light* preservative pending assembly. When the wheels showed signs of rust during the delay period, the contractor removed the light preservative, reburnished the wheels, and covered them with heavy preservative which provided additional protection made necessary by the delay. The contractor made claim for the costs of the additional work to provide greater protection during the delay period, and the Contracting Officer denied the claim. Upon appeal to the Armed Services Board of Contract Appeals, the case was dismissed upon the jurisdictional ground in the following language:

> "It would appear that when (a) because of unforeseen developments the Government requests that production be stopped while it decides whether or not specifications must be changed; (b) a contractor complies with such request; (c) that compliance—even though no change in specifications is ultimately made—necessitates the performance of operations that would not have been required but for the stoppage; (d) and the Government and the contractor can agree as to what the extra operations were and what a reasonable price for them would be, the Government should be able to pay the contractor for the extra work under the contract. Arguments can be made to justify such payment on the basis of the "Changes" article, or the "Extras" article, or to justify such payment on the theory that the Government's request and the contractor's compliance amount to a supplemental agreement under which payment can be made. At first blush, the attempt of the contracting officer and the appellant to effect payment in this case on some such theory seem to be a more reasonable solution both from the standpoint of the Government and the contractor, than is the solution suggested in the Governor's brief of having the contractor sue for damages.
>
> "Be that as it may, however, a further review of the decisions by the Court of Claims upon which the Government's argument is ultimately based leads us again to the conclusion that we reached in the appeals of *Globe Building Materials Company,* ASBCA No. 770; *Rome Grader Corp.,* ASBCA No. 1447; and *Systems Development,* ASBCA No. 1432; that is to say that even though the contracting officer and the appellant would treat the claim as one for extra work payable—if factually justified—under the contract, it is nonetheless, in view of the decisions of the Court of Claims, a

> claim for damages that cannot be administratively settled and pai by the Department of the Army.
>
> "As recently as 5 April 1955 the Court of Claims in its decisio in the case of *F. H. McGraw and Company* v. *The United State* No. 49237, has reaffirmed its position that the "Changes" articl authorizes justified stop orders of reasonable duration, and tha stop orders of unreasonable duration constitute a breach of contract for which the Government is liable by way of damages.
>
> "Under the circumstances, there is no basis upon which th Board can make provision for the payment of any amount to th appellant for any of the extra work occasioned by the stop orde Thus, to the extent that appeal No. 2432 requests payment for th costs of the extra work required, it is dismissed as presenting matter beyond our jurisdiction. . . ."

In the appeal of *Buttondex Corporation,*[36] which involved gu trunnion brackets, the contractor notified the Contracting Office of defective specifications on 16 October 1952 and that it coul not proceed with production until a clarification of the drawing was received. A Change Order providing the requested clarification was not issued until 7 April 1953. The contractor claime $.47 per item increase in price for additional labor and tool required by the change and an additional sum aggregating $3,61 for overhead and expense of the delay. The delay claim (standb time) was denied by the Contracting Officer and, upon appeal t the Armed Services Board of Contract Appeals, the case wa dismissed. The Board said:

> "Appellant's contentions are understood to mean substantiall as follows: That it had overhead and general and administrativ (hereafter referred to as G & A) expenses running over the whol year; that this contract's contribution toward paying off those expenses was properly 31% of the whole, or, $8,687.44; but, for fiv months of that period, the Government contends that this contract should contribute nothing toward paying off those expens for the reason that no production, during that period, was engage in when no stop-order had been issued; that, under appellant theory, this contract was a part of appellant's business during th whole period, therefore, this contract, as amended by the chang order, should contribute toward the overhead and G & A expens during the whole period, and appellant should be reimburse through the medium of the equitable adjustment.
>
> "Court decisions compel us to analyze the costs of the stand

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[36] *Buttondex Corporation,* ASBCA No. 2162 (Feb. 1956).

or idle period in order to answer the following question: Was the standby time the direct result of the change order, or was it the direct result of delay on the part of the Government before issuing the change order?

"If the costs of the standby period were the direct result of the change order, then the courts tell us such costs are compensable through the medium of the equitable adjustment. *United States* v. *Callahan Walker Construction Co.,* 317 U.S. 56, 1 CCF 399 (1942); *Silberblatt & Lasker, Inc.* v. *The United States,* 101 C. Cls. 54 (1944); *United States* v. *John A. Johnson & Sons,* 65 Fed. Supp. 514, Affd 153 Fed 2nd 534 (1944); Appeal of *Chas. M. Mosser t/a Mosser Constr. Co.,* BCA No. 711, 2 CCF 1127 (1944); Appeal of *MacDonald Construction Company,* ASBCA No. 98, 4 CCF par 60943 (1950). But if the standby time is the direct result of a delay caused by the Government, then the costs thereof are compensable, or not, depending upon the determination of the question whether the delay was reasonable or unreasonable. If reasonable, then no monetary compensation is recoverable. *United States* v. *Rice,* et al, 317 U.S. 61, 1 CCF 396 (1942); *Langevin* v. *The United States,* 100 C. Cls. 15, 1 CCF 547 (1943). If unreasonable, then the costs are reimbursable not through the medium of an equitable adjustment but in the form of damages for a breach of the contract. *United States* v. *Rice,* et al, *supra; Silberblatt & Lasker, Inc.* v. *The United States, supra; F. H. McGraw & Co.* v. *The United States,* C.Cls. No. 49237, decided 5 April 1955. In the event the claim is for damages for alleged unreasonable delay caused by the Government, then, the courts tell us, the issue has arisen outside of the contract and is therefore a matter beyond the jurisdiction of the contracting officer and of this Board finally to decide. *Silberblatt & Lasker, Inc.* v. *The United States, supra.*

* * * *

"The trouble with counsel's argument is that it ignores that part of the *Rice* decision which states:

' * * * for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision * * *.' "

* * * *

"Now to go back to appellant's evidence of its overhead and G & A expenses, we can discover no item thereof which can be held to be a direct result of the change ordered. They were expenses incident to a period when by procrastination of the Government, no performance was executed on the contract here under

> consideration. We hold, therefore, that those expenses are n an element of the equitable adjustment for the change ordere
>
> "Insofar as the appeal involves a claim for damages for allege breach of the contract, it is dismissed for lack of jurisdiction on th part of this Board."

In the appeal of *Globe Building Materials Company,*[37] th Board, in dismissing appellant's claim for delays, said:

> "The Court of Claims has repeatedly held, however, that as a incident to its rights under the 'Changes' article to issue chang orders the Government has the right, without liability, to dela a contractor's performance of the contract work for a reasonab period while the Government arrives at a decision as to what pr visions are to be incorporated in a change order which the Govern ment desired to issue, or as to whether or not a change order is i fact to be issued. *Harwood-Nebel Construction Co., Inc.* v. *Unite States,* 105 C.Cls. 116, 158; *James Stewart & Co., Inc.* v. *Unite States,* 105 C.Cls. 284, 328; *Arthur W. Langevin* v. *United State* 100 C.Cls. 15, 31; *George A. Fuller Company* v. *United States,* 1 C.Cls. 70,101; *Anthony P. Miller, Inc.* v. *United States,* 111 C.Cl 252, 330; *Magoba Construction Co.* v. *United States,* 99 C.Cls. 66 690; *Silberblatt & Lasker* v. *United States,* 101 C.Cls. 54, 80; se also *Brand Investment Company* v. *United States,* 102 C.Cls. 4
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> * * * *
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> "It is apparent, in the various cases cited in this connectio that the Court of Claims has consistently considered the delay i excess of reasonable period of delay as constituting a breach contract by the Government; no case has been brought to the a tention of the Board, nor has the Board found any case, wherei the Court of Claims, or any other Federal court, has held that period of unreasonable delay associated with the Governmen deliberations concerning a prospective change order entitles a co tractor to (or should or could have been treated within the a ministrative agency as a matter for) an equitable adjustment und the 'Changes' article. In view of this pattern of judicial decision the Board is of the opinion that it would not be justified in co cluding that any unreasonable period of delay which might found to have been occasioned Appellant in the instant case e titled Appellant to an equitable adjustment under the 'Change article."

In the appeal of *Rome Grader,*[38] appellant made claim f unreasonable delay by the Government from 26 December 195 when deliveries were stopped and tests begun, until 12 May 1952, when the changes were ordered. In denying appellant's claim, the full Board said:

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[37] *Globe Building Materials Company,* ASBCA No. 770 (March 1952).

[38] *Rome Grader,* ASBCA No. 1447 (June 1953).

> "To the extent that Appellant is to be understood as seeking compensation for unreasonable delay on the part of the Government in conducting its inspection and deciding upon the changes which it desired Appellant to make, it is well settled that such a claim is a claim for damages for breach of contract and does not lie within the scope of the contract disputes article. *Samuel Plato* v. *United States,* 86 C.Cls. 665, 677, 678. See also *Globe Building Materials Company,* ASBCA No. 770, decided 14 March 1952 and cases cited therein.
>
> * * * *
>
> "Such relief as Appellant may be entitled to in the instant case is a matter for judicial decision, and does not lie within the jurisdiction of this Board."

In the appeal of *Systems Development,* ASBCA No. 1432, decided 29 June 1953, the appellant's claim included, among other items, an amount of $279.00 for costs which it described as follows:

> "Costs due to disruption of production schedule due to these delays. The contractor's work load was decreasing at that time, and it was his intention to lay off three men as soon as this subject contract was completed, should no other business come in the meantime. The contractor was unable to keep them efficiently ocupied while waiting for Navy approval. They were engaged in 'make work' projects for about three weeks; at which time the contractor had not received prototype approval but decided to proceed on his own authority and complete the trainers. These employees were then terminated as of March 14, 1952. Approximately 50% of their time for three weeks was of no value to the contractor, since they were retained because of the delays by the Navy. This resulted in a cost to the contractor of an estimated 180 man hours at $1.55 an hour cost or $279.00."

In dismissing the appeal as to this item of the claim, the full Board said:

> "Similarly, to the extent of a reasonable period of delay on the part of the Government in issuing specification changes 6 and 7 under the subject contract, we hold that the Government is not liable under the changes article for Appellant's cost incident to such delay; to the extent of delay beyond a reasonable period, or unreasonable delay on the part of the Government in issuing the

> changes, we hold that Appellant's claim for the $160.72 ite and for the $279.00 item presents a claim for damages for breac of contract over which this Board has no jurisdiction. Further, t the extent that Appellant claims that these two items of cost wer due to delay on the part of the Government in issuing shippin instructions for delivery of the devices, the Board holds that suc a claim is clearly one for damages for breach of contract ove which this Board has no jurisdiction. Therefore, the Board doe not consider these two items of cost in determining the price ac justments due to the changes made in the contract specifications.

In appeal of *The Lambert Company*,[39] the Board, in dismissin the appeal with respect to the claim for damages, said:

> "The appellant's performance was delayed as a result of change ordered or authorized by the Government. For instance, we hav seen that the marking on Container No. 4 was not finally dete mined until 3 December 1951. Upon consideration of the natur of the appellant's work—packaging of several components, assem bling them in sets and packing them for shipment—it can b understood that it was impractical to complete any portion c the work until all components and containers could be ordere Thus, the appellant could not be expected to have filled 106,54 containers each of the impregnate, the paraffin and the Santomers until it was in a position to fill Container No. 4 with the dye.
>
> "It is undoubtedly true that the delay increased, at least to som extent, the appellant's cost of performance. The primary que tion to be determined is whether the contract makes provisio for the reimbursement of those costs.
>
> "The 'Changes' article authorized the Government to issue th change orders and required an equitable adjustment of the cor tract price in case the cost of the work was thereby increased c decreased. Adjustments appear to have been made for increase or decreases which have resulted from what might be termed th nature of the changes. These have been tabulated on page 7 c this opinion.
>
> "The appellant is not here seeking additional material cos such as the increase in the cost of Santomerse over the cost c Aresklene, the increased cost of the larger size Container No. or the cost of slitting the sealing discs. Rather, it requests con pensation for certain fixed costs it incurred during the period i plant was idle. These were items such as rent, heat and variou kinds of labor.
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> "It is settled that the Government may be liable to a contract

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[39] *The Lambert Company*, ASBCA No. 1410 (October 1953).

> for certain expenses incurred as a result of unreasonable delay in making changes. The contractor's right to such compensation is not governed by the 'Changes' article but is one arising outside of the contract. A dispute concerning this right is not one within the 'Disputes' article. *Silberblatt & Lasker, Inc.* v. *United States,* 101 C.Cls. 54, 80-82."

In the appeal of *W. T. Stonecypher,*[40] upon a Motion to Dismiss a portion of the claims asserted, the Board said:

> "DECISION ON MOTION
>
> "5. In the Board's opinion, Claim No. 1 as presented in the complaint alleges that an unwarranted delay on the part of the Government in the issuance of Change Order "B" resulted in the expense for which claim is made, and thus presents a claim for damages for breach of contract. As such it is beyond the jurisdiction of the Board under the disputes clause of the contract. *Globe Building Materials Company,* ASBCA No. 770, decided 14 March 1952; *Systems Development,* ASBCA No. 1432, decided 29 June 1953; *Pressed Steel Car Company, Inc.,* ABSCA Nos. 2450, 2455, 2432, decided 9 June 1955; *Roy C. Ek,* ASBCA No. 3096, decided 6 August 1956; *Farnsworth & Chambers Co., Inc.,* ASBCA No. 3061, decided 29 February 1956.
>
> "6. The motion to dismiss is sustained and Claim No. 1 of the appeal is dismissed. The balance of the appeal is accordingly in order for further proceedings on the merits."

In the appeal of *McKay-Helgerson Company,*[41] completion of the work required by the contract was extended on four occasions and delayed without the fault or negligence of the contractor. The contractor made a claim for $148,598.90, alleging the following delays:

> "* * * The delay in completing this job from the allotted time of (8) months to an actual time of thirty-six (36) months was due to incomplete, inaccurate and conflicting plans and specifications, the lack of information and incomplete and incorrect information supplied to the Appellant by the Government in pursuance of its work, lack of coordination or liaison between the Using Service and those in charge of construction for the Government and poor administration on the part of the Government and its agencies. This delay was in no way caused by improper performance on the part of the Appellant and said delays were all beyond the control of the Appellant."

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[40] *W. T. Stonecypher,* ASBCA No. 3691 (January 1957).

[41] *McKay-Helgerson Company,* ASBCA No. 3787 (January 1957).

The claim was denied by the Contracting Officer and the contractor appealed. A Motion to Dismiss was urged by the Government, and the Board, in granting the Motion, said:

> "* * * Appellant has already obtained price adjustments for its costs of performance of changed or extra work. By this appeal Appellant seeks to obtain compensation for additional cost incurred only because of alleged unwarranted or unreasonable delays on the part of the Government in deciding upon and issuing the change orders mentioned and in taking other administrative actions pursuant to contract requirements. We find that there is no provision in subject contract whereby equitable adjustments in the contract price or additional compensation may be granted Appellant for its alleged damages for delays. Assuming for the purpose of the motion that these allegations of delay are true, this is a claim for damages for breach of contract and is not within the jurisdiction of the Board under the disputes clause of the contract. *Globe Building Materials Company,* ASBCA No. 770, decided 14 March 1952; *Systems Development,* ASBCA No. 1432, decided 29 June 1953; *Rome Grader Corporation,* ASBCA No. 1447, decided 29 June 1953; *Farnsworth & Chambers Co. Inc.,* ASBCA No. 3061, decided 29 February 1956; and *Archie & Allan Spiers, Inc.,* ASBCA No. 3503, decided 6 August 1956. Such relief as Appellant may be entitled to is a matter for judicial decision, not this Board.
>
> "The motion to dismiss must be and is hereby granted and the appeal is dismissed for lack of jurisdiction."

In the appeal of *Utah Construction Company,*[42] the Interior Board used the same approach as the Armed Services Board and held that a Government-caused delay in the performance of the contract did not come within the "Changes" article.

There have been few cases decided which have considered the new "Changes" article. In the appeal of *Weldfab, Inc.,*[43] the Interior Board held that standby costs incurred during the period of the Government's delay in furnishing a clarification of contract discrepancies, which clarifications when issued were treated by the Board as constructive Change Orders, are not compensable under the new "Changes" article. It appears that recovery would have been allowed only if the delay was caused by, and incurred after, the issuance of the Change Order.

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[42] *Utah Construction Corp.,* IBCA No. 133, 60-1 BCA 2649.

[43] *Weldfab, Inc.,* IBCA 268.

When the new "Changes" article came up for consideration before the Armed Services Board in the appeal of *Craig Instruments Corp.,*[44] it was held that a Government-caused delay in approving samples did not constitute a change. The Board also indicated that it adhered to the line of cases on the previous "Changes" article holding that where a Change Order was issued and there has been a delay attributable to the Government affecting work not covered by the Change Order, the "Changes" article cannot be used as a means of obtaining an equitable adjustment for the unchanged work.

While the matter appears to have been well settled almost consistently[45] by the long line of Board decisions, the controversial nature of the problem was evidenced recently in the appeal of *Simmel-Industrie Meccaniche Societa Per Azioni*[46] involving a supply contract. This case was decided by the three Panel Chairmen of the Armed Services Board of Contract Appeals in a two-to-one decision. It was held that absent a contract provision for an adjustment for Government-caused delay (like the "Government-Furnished Property" or "Price Adjustment for Suspension, Delay or Interruption of the Work" clauses) the "Changes" article of a supply contract provides no basis for compensating a contractor for stand-by costs incurred because of the Government's failure to inspect pilot lots and accept promptly such lots and contract deliveries. The dissenting opinion noted that the Board's holdings on stand-by costs are inconsistent with its holdings on claims for acceleration costs. The Board has uniformly treated the Government's order to accelerate performance as a "change" under the "Changes" article, notwithstanding the absence of a provision in the contract specifically reserving a right of the Contracting Officer to direct acceleration.

The decisions by the Armed Services Board of Contract Appeals cited, *supra,* and quoted from are only a few of the cases on the subject. They will serve, however, to illustrate the repeated holdings by the Board that, when a change is ordered under the "Changes" clause of the contract, the equitable adjustment contemplated therein is limted to the increased cost of the changed work and *does not include* increased cost of the unchanged work resulting from delayed performance caused by the changes which is compensable under the contract only by an extension of time. The many Board decisions touching upon the subject are collected in Mr. Roswell M. Austin's four volume Digest under the titles "Damages" and "Delays." [47] Also, a selected collection of cases on the subject is found in "Procurement Legal Service," [48] a publication of the Department of the Army.

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[44] *Craig Instruments Corp.,* ASBCA No. 6385, 61-1 BCA 2875.

[45] In *Todd Shipyards Corp.,* ASBCA Nos. 649 and 650, 28 September 1951, it was held that a delay in the contract performance caused by the Government constituted a change for which relief could be granted by the Board.

[46] *Simmel-Industrie Meccaniche Societa Per Azioni,* ASBCA No. 6141, 61-1 BCA 2917.

IV. CONCLUSION

It must be concluded that, under the "Changes" article which was required in fixed-price supply contracts until 1 April 1958, and under the "Changes" article prescribed for Army construction contracts, administrative settlement of delay claims is not authorized. The new "Changes" article does not appear, from the few cases decided thereunder, to result in any substantial departure from this general rule. The right to make changes is reserved to the Government in the "Changes" clause and the occurrence of delay is clearly contemplated therein. As an incident of its right to issue change orders, the Government has the right, without liability, to delay a contractor's performance of the contract work for a reasonable period while the Government arrives at a decision as to what provisions are to be incorporated into a change order which the Government desires to issue, or as to whether a change order is in fact to be issued. In the absence of a contract provision authorizing a price adjustment for delay, any delay in excess of such reasonable period to which the Government is already entitled under the contract as originally executed, i.e., an unreasonable delay, constitutes a breach of contract giving rise to liability by way of damages. Since relief for unreasonable delay is by way of a claim for damages predicated upon a breach of contract, the matter cannot be administratively settled and paid by the Department of the Army and does not lie within the jurisdiction of the Armed Services Board of Contract Appeals. The damage claim is for judicial determination, the remedy being exercised by suit in a court of competent jurisdiction. The rule, as stated, has been developed as a result of the principles upon which the Court of Claims determines liability of the Government for delays occasioned by its action or inaction under the "Changes" article of the contract. Where the Court of Claims concludes that the delay involved gives rise to liability of the Government, the judgment fixing such liability is an award for damages and the claim is treated as arising outside of the terms of the contract. As has already been made clear, Contracting Officers and the Armed Services Board of Contract Appeals do not entertain and administratively settle claims for damages arising outside of the contract terms.

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[47] Austin, *Digest of the Decisions of the Armed Services Board of Contract Appeals,* Vol. I—1942-50; Vol. II—1950-53; Vol. III—1953-54; Vol. IV—1955-56.

[48] Department of the Army Pamphlet Nos. 715-50-1, *Procurement Legal Service,* January 1957.

V. The Future

What of the future? We must recognize the trends—the "straws in the wind." Already we have seen a broadening of the "Changes" clause,[49] the impact of which upon the question of administrative settlement and payment of delay claims has as yet not been fully litigated and decided. The next approach may be through inclusion in Government contracts of additional clauses patterned after the "Price Adjustment for Interruption, Delay, or Suspension of the Work" clause and the "Government-Furnished Property" clause, providing relief at the hands of the Contracting Officer and the Board for delays.

All of these things suggest that, whether desirable or not, we are moving steadily toward provision for administrative settlement of delay claims in Government contracts. It is not too early to begin thinking about the many problems of administration that are certain to be generated thereby.

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[49] *Supra,* Footnotes 11, 43, and 44.

THE LESSON OF THE INDEPENDENT GAS PRODUCER REGULATORY EXPERIMENT

By Cecil E. Munn *

Mr. Willard W. Gatchell, who was Mr. Mason's distinguished predecessor as general counsel of the Federal Power Commission, spoke at the Southwestern Legal Foundation this past February on the Regulation of Independent Gas Producers. Some of us were intrigued by his opening comment, "As one who has labored long in the vineyard of federal industry regulation, I come to this institute with a feeling of genuine optimism." We wondered why! Such an emotion might have been explained by the natural exhilaration that he undoubtedly felt from the release of pressure when the very capable John C. Mason assumed the terrific burdens of the office which he had borne so long. I understand tranquilizer pills have the same effect. Nevertheless, I read his paper in its entirety in search for some more substantial basis by which to explain and share his optimistic outlook, but not a clue was apparent. Hence, with reluctance to cast myself in the role of a "crepe hanger" but under the compulsive restraints of the mental honesty which the American Bar Association inspires and commands, I confess exactly the opposite feeling. As I have witnessed its attempted application to independent producers of natural gas, Mr. Gatchell's vineyard has yielded nothing but grapes of wrath.

In this author's judgment, perhaps not unanimously shared but by no means unique, the Federal Power Commission's effort to regulate independent gas producers has been a complete failure and is not likely to improve.[1] We are no nearer to a solution of the problem today than we have ever been. If, as lawyers, we were to intimate that there has been anything successful about this unique regulatory attempt, we should thereby subscribe to a deplorably low standard of professional achievement. Widespread agreement of the failure of the gas producer regulatory experi-

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[1] It may be likened to the Missouri mule said to be without "pride of ancestry or hope of posterity." Lamm, J. concurring in Lyman v. Dale, 262 Mo. 353, 171 S.W. 352, 354, which judicial opinion, if it has thus far escaped the reader, should be brought to his attention for a delightful literary interlude.

ment, at least to date, will be found; the more controversial question is the reason for the failure.

In reporting on regulatory agencies last December to then President-elect Kennedy, former Harvard Law School Dean James M. Landis cast his stone in these words:

> "The Federal Power Commission without question represents the outstanding example in the federal government of the breakdown of the administrative process." [2]

Further, he referred to the regulation of natural gas as "the most dismal failure in our time of the administrative process." [3]

A year earlier Fortune Magazine had published what many of us considered a very biased and uninformed article bearing this inflammatory headline:

> "A fumbling Federal Power Commission, reluctant to tackle its job of regulation has created confusion bordering on chaos." [4]

The FPC itself, in finally announcing its considered rejection (with some bafflingly vague limitations) of the cost-of-service regulatory method for producers, also acknowledged the administrative collapse. It was in its recent *Phillips* opinion that the Commission confessed:

> "Thus, if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D.—eighty-two and one half years from now." [5]

And I don't believe there is much likelihood of tripling their Staff at least until we raise the twenty billion dollars needed to get a man on the moon. That project has more glamour.

But why the failure? Is it because the members of the Commission have been stubborn or stupid or biased or lazy? That was

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[2] Landis, James M. "Report on Regulatory Agencies to the President-elect" submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate (Dec. 1960), p. 54.,

[3] *Ibid.* p. 58.

[4] Smith, Richard Austin, "The Unnatural Problems of Natural Gas" Fortune (Sept. 1959) p. 120.

[5] Opinion 338, issued Sept. 28, 1960, In Re Phillips Petroleum Company, 24 F.P.C. 537, 546.

Dean Landis' conclusion expressed in this somewhat more sophisticated language:

> "These defects stem from attitudes, plainly evident on the record, of the unwillingness of the Commission to assume its responsibilities under the Natural Gas Act and its attitude, substantially contemptuous, of refusing in substance to obey the mandates of the Supreme Court of the United States and other federal courts." [6]

That accusation is grossly unfair and, I believe, completely inaccurate! To my mind it is unfortunate in the extreme that public servants, trying conscientiously to serve the American people, must endure such lambasting, particularly when it comes almost with the dignity of Presidential approval. The charge that the lack of an administrative solution to the problem is attributable to the weakness of the administrators rather than to the nature of the problem itself reflects a misplaced confidence in the administrative process as a panacea for whatever ills confront us.[7] Anyone who has ever attempted to solve this gas-pricing problem himself, and do it sensibly and without being arbitrary —which, as lawyers, we must agree is an essential to any acceptable solution—is likely to be considerably more charitable in his appraisal of the Commissioners. No, the difficulty is much deeper than indicated by such caustic charges of ineptness in office. It is best seen by focusing the problem in its historical perspective, unduly abbreviated, of course, because of time limitations.

In the *Panhandle Eastern* opinion, issued April 15, 1954,[8] the Commission carefully considered for the first time whether the cost-of-service regulatory formula it was using to review pipeline company rates, under the broad statutory objective that they be "just and reasonable," was appropriate as applied to the gas produced by the pipelines as an incident to their main transmission function. The study compelled a negative answer just as Mr. Justice Jackson had prophesied earlier.[9] You see the fairness of the cost-of-service approach is premised on the existence of a reasonably predictable relationship between the amount of expenditures of the regulated company and the amount of service thereby provided. But, as to the exploration for and production of natural gas, any such premise is demonstrably false.

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[6] Landis, *supra* Note 2, at p. 55.

[7] Without implying any similarity between the dreaded cancer and the effort to use the administrative process for pricing a commodity, I pose this question: Would anyone condemn those research scientists groping for a cancer cure for their contemptuous refusal to produce it?

[8] In re Panhandle Eastern Pipe Line Company (1954), 13 F.P.C. 53.

[9] In Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 88 L. ed. 333 (1943), Mr. Justice Jackson wrote a classic dissent, concurred in and applauded by Mr. Justice Frankfurter. The farsightedness of that opinion seems almost prophetic in the light of subsequent developments. His language is worth recalling because of its particular helpfulness in understanding why the Federal

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Power Commission has bogged down in trying to regulate producers by a rate-base approach:

> "The prudent investment theory has relative merits in fixing rates for a utility which creates its service merely by its investment. The amount and quality of service rendered by the usual utility will, at least roughly, be measured by the amount of capital it puts into the enterprise. But it has no rational application where there is no such relationship between investment and capacity to serve. There is no such relationship between investment and amount of gas produced. Let us assume that Doe and Roe each produces in West Virginia for delivery to Cleveland the same quantity of natural gas per day. Doe, however, through luck or foresight or whatever it takes, gets his gas from investing $50,000 in leases and drilling. Roe drilled poorer territory, got smaller wells, and has invested $250,000. Does anybody imagine that Roe can get or ought to get for his gas five times as much as Doe because he has spent five times as much? The service one renders to society in the gas business is measured by what he gets out of the ground, not by what he puts into it, and there is little more relation between the investment and the results than in a game of poker." (L. ed. 369).
>
> "Hope's business has two components of quite divergent character. One, while not a conventional common-carrier undertaking, is essentially a transportation enterprise consisting of conveying gas from where it is produced to point of delivery to the buyer. This is a relatively routine operation not differing substantially from many other utility operations. * * * A rate base calculated on the prudent investment formula would seem a reasonably satisfactory measure for fixing a return from that branch of the business whose service is roughly proportionate to the capital invested. * * *
>
> "The other part of the business—to reduce to possession an adequate supply of natural gas—is of opposite character, being more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business. A thousand feet of gas captured and severed from real estate for delivery to customers is recognized under our law as property of much the same nature as a ton of coal, a barrel of oil, or a yard of sand. * * *
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> "Is it necessary to a 'reasonable' price for gas that it be anchored to a rate base of any kind? Why did courts in the first place begin valuing 'rate bases' in order to 'value' something else? The method came into vogue in fixing rates for transportation service which the public obtained from common carriers. The public received none of the carriers' physical property but did make some use of it. The carriage was often a monopoly so there were no open market criteria as to reasonableness. The 'value' or 'cost' of what was put to use in the service by the carrier was not a remote or irrelevant consideration in making such rates. Moreover the difficulty of appraising an intangible service was thought to be simplified if it could be related to physical property which was visible and measurable and the items of which might have market value. The court hoped to reason from the known to the unknown. But gas fields turn this method topsy turvey. Gas itself is tangible, possessible, and does have a market and a price in the field. The value of the rate base is more elusive than that of gas. It consists of intangibles—leaseholds and freeholds—

The City of Detroit appealed that decision and the Court of Appeals for the District of Columbia Circuit reversed the Commission, holding that this conventional rate-base approach must be used "at least as a point of departure" and further prescribing what has proved to be an impossible requirement for a quantitative showing of the necessity for the precise amount of such "departure." [10] Of course, a judicial requirement that is impossible to meet is not really a requirement at all—rather it is a prohibition.[11] Thus, for all practical purposes, that court held that pipeline rates for their own gas production had to be fixed by the cost-of-service formula—even though the result could be to require the owner of the gas to pay the purchaser for taking it.[12]

While the *Panhandle Eastern* case was pending on appeal, the task of regulating the price at which independent producers sell to interstate pipelines was foisted on to the Commission by the Supreme Court.[13] And the independent producer, by definition,

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> operated and unoperated—of little use in themselves except as rights to reach and capture gas. Their value lies almost wholly in predictions of discovery, and of price of gas when captured, and bears little relation to cost of tools and supplies and labor to develop it. Gas is what Hope sells and it can be directly priced more reasonably and easily and accurately than the components of a rate base can be valued. Hence the reason for resort to a roundabout way of rate base price fixing does not exist in the case of gas in the field. * * *
>
> "To regulate such an enterprise by undiscriminatingly transplanting any body of rate doctrine conceived and adapted to the ordinary utility business can serve the 'public interest' as the Natural Gas Act requires, if at all, only by accident. * * * If natural gas rates are intelligently to be regulated we must fit our legal principles to the economy of the industry and not try to fit the industry to our books." (L. ed. 368-370.)

[10] City of Detroit v. Federal Power Commission, 230 F. 2d 810, 817 (D.C. Cir. 1955), cert. den. 325 U.S. 829:

> "If the Commission contemplates increasing rates for the purpose of encouraging exploration and development, or the ownership by pipeline companies of their own producing facilities, it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose."

[11] Cf. Knappen, R. S., "Give FPC Credit for Trying" The Oil and Gas Journal July 28, 1958, pp. 161-2:

> "In my judgment, there is no intelligence this side of heaven sufficient to determine what is the price which is necessary to encourage just enough search to maintain adequate reserves for the expanding gas market."

[12] See City of Detroit v. Federal Power Commission, *supra,* at 813, footnote 6 in the opinion, wherein the Court observes that the allowance for Panhandle Eastern's produced gas, as computed by the Staff, was a minus 1.24 cents per mcf.

[13] Phillips Petroleum Company v. State of Wisconsin, 347 U.S. 672, 98 L. ed 1035 (June 7, 1954). On May 25, 1961 Chairman Kuykendall, testifying on behalf of the Commission before the Senate Commerce Committee holding hearings on S. 666 observed:

> "Furthermore, much of the difficulty in applying the Natural Gas Act to

had no pipeline to serve as the basis for a cost-of-service calculation. Hence, the application of that type of regulatory formula to him would seem to be the *reductio ad absurdum.* The late Commissioner Stueck once described it as "an effort to play baseball by football rules." Can you conceive of any less fruitful undertaking? But if not that regulatory method, what other? *There is the focal problem.*[14] It is still not solved and the appellate courts have provided no guidance with sufficient preciseness to be used as tools of decision by the Commission. They have been more eloquent than articulate.[15]

> independent producers arises because that statute was not drawn with the operations of the producing phase of the industry clearly in mind."

This is no doubt a tactful way of alluding to the substantial school of thought which holds that the Supreme Court's decision in the Phillips case was completely erroneous and that Congress never intended to regulate sales by independent producers and so did not consider them at all at the time of enacting the statute, "clearly" or otherwise. The Federal Power Commission had so construed the statute for 16 years prior to the court's decision in that case.

[14] Commissioner Kline, in an address delivered September 16, 1958, in New Orleans, Louisiana before the Independent Natural Gas Association of America, entitled "Current Problems in the Regulation of Natural Gas" went to the heart of the difficulty:

> "The one big problem before the Commission, one which dwarfs all others and one which has been with us since that fateful date, June 7, 1954, is, of course, the problem of how to effectively regulate the rates of independent producers. The Commission has not, despite the lapse of more than four year's time devised a method or formula for dealing with this problem, nor has it set up any standards or criteria for determining the justness and reasonableness of producers' rates."

The statement is just as true today as it was in 1958. On April 13, 1961, President Kennedy sent to the Congress of the United States his "Special Message on Regulatory Agencies" in which the Federal Power Commission was given more notice than any other single agency. It is remarkable that at no point did he even mention this central problem of inability to establish regulatory criteria for independent producers. No doubt the explanation is that his adviser, Dean Landis, also missed the point in his report.

[15] *E.g.,* cf. the language of the Supreme Court, speaking through Mr. Justice Clark, in an opinion which saddled the Commission with the task of initial rate fixing as well as review of rate increases, Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378, 3 L. ed. 2d 1312, 1319, 1320:

> "Even though the Commission did march up the hill only to march down again upon reaching the summit we cannot say that this about-face deprived it of jurisdiction."
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> * * *
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> "This is true because the delay incident to determine in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. * * * This long delay, without the protection of refund, as is possible in a § 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers."

The question to be answered was what types of evidence would prove a 21¢ price, for example, to be just and reasonable and a 20¢ or 22¢ price not to be. The Commission dug in. It issued a notice in Docket R-142 inviting suggestions from all concerned for a proper method of evaluating independent producer prices. Spokesmen for the producers insisted that the FPC use a current market price standard, arriving at a fair value for this commodity they were selling. The anti-producers advocated the cost-of-service formula, apparently in utter disregard of the nonsense implicit in trying to apply any such method to an independent producer. The Commission, obviously feeling it was being asked to choose between abdication of regulation, on the one hand, and asinine regulation, on the other, chose neither.[16] It may be said to its everlasting credit that the real reason the FPC has not announced a regulatory method for independent producers is its obvious conviction that inherent in the assignment of regulatory responsibility is the overriding mandate to make sense. Except for reliance on the currently negotiated field prices established from time to time by the workings of our economy, the Commission has been unable to find any measure of reasonableness which does make sense. But the courts have discouraged rate review by reference to market price.[17] The result has been a total collapse of the

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In directing the Commission as to what it should do in a certificate proceeding, because of the sluggishness of its rate procedure, the Court went on to require "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7."

[16] On December 1, 1955 the Commission issued an order terminating the proceedings in Docket No. R-142 and said:

> "* * * the information gained in this proceeding convinces us that, on the basis of the record herein, we should not lay down any rules as to what would be necessary or appropriate for consideration in determining the just and reasonable rates of independent producers subject to our jurisdiction under the Natural Gas Act."

[17] See, *e.g.*, Bel Oil Corporation v. Federal Power Commission, 255 F. 2d 548, 553 (5th Cir. 1958):

> "We do not hold that evidence of field price is irrelevant. We do hold that evidence of unregulated prices in the field is not sufficient to warrant a finding by the Commission that a price comparable to them is just and reasonable within the intendment of the Natural Gas Act."

The Court went on to say however:

> "The regulation of the prices at which thousands of 'natural gas companies' may sell to the pipeline companies is a difficult one at its best. It is a field which in many respects requires new formulas to test what is just and reasonable."

But no court has given any help in devising the necessary "new formulas" nor has the Commission been able to devise them. In this same opinion the court administrative process in this area—not, as Mr. Landis believes, because the Commissioners don't want to do the job,[18] but because they don't know how! [19] I make that statement, not in an effort to be iconoclastic, but because I have no doubt that it is true, and it will continue to be true regardless of the identity of presidential appointments to the Commission.

In this impossible wilderness, the FPC started setting hearings in individual producer rate cases in the desperate hope that something might turn up.[20] With candor, which I trust will not be confused with hostility, I must say the Commission's Staff was not very helpful, because the range of their vision was much too narrow. In the early Section 4 rate-increase cases,[21] the producers introduced everything they could think of except cost-of-service.[22] The Staff consistently refused to offer any evidence and

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gave left-handed approval to Opinion No. 310, In re *Pan American Petroleum Corp.*, 19 F.P.C. 463, 467 (April 4, 1958) wherein the Commission had approved a rate increase as "just and reasonable" in spite of the lack of any cost-of-service evidence because, to fix rates in that case on a rate-base formula, would have resulted in 133 different prices for gas from the same field:

> "We are also concerned with the results that would be produced by the use of the rate base method. To paraphrase Justice Jackson in his concurring opinion in Colorado Interstate v. F.P.C. 324 U.S. 581, 610, these results would be 'delirious' and 'capricious' if applied to the operations of the producers involved here. In this proceeding there are eleven different rate bases, 133 in the entire field, and the record indicates that these rate bases bear no reliable relationship to the amount of oil and gas produced."

[18] One wonders what he would assume to be their motive for refusing to assume their responsibilities and to obey the federal courts.

[19] This is a factual, not a derogatory, appraisal. They also don't know how to build a perpetual motion machine. That is no condemnation.

[20] In re Transcontinental Gas Pipe Line Corporation, Order Denying Applications for Rehearing, issued October 31, 1958, 20 FPC 571, 572:

> "Actually, however, no definitive tests have as yet been evolved for fixing the just and reasonable rates of independent producers, althought *rate proceeding to this end are in progress.*" (Emphasis added.)

[21] Under Section 4 of the Natural Gas Act the Commission reviews a rate increase proposed by the "natural gas company" and the statute places the burden of proof upon the proponent of the increase.

[22] With absolutely no guidance from either the Commission or the courts as to the type of evidence which would satisfy the Commission that a given rate was "just and reasonable" and with the dogged determination of the Staff to insist upon dismissal at the conclusion of the producer's evidence in all cases except those wherein cost-of-service calculations were presented, it was somewhat disheartening for the producers to hear Commissioner Kline blame them for not expediting the hearings:

> "Another cause for our unduly long and protracted proceedings is the tendency on the part of every party to a proceeding to produce every possible bit of evidence having any bearing on the case. * * *

moved to dismiss on the ground that the producer had not met his yet-to-be-defined burden of proof. The motions were generally sustained.[23] As a result no discernible criteria emerged from the Section 4 cases.

In Section 5 rate-review cases, the burden of proof is on anyone challenging a producer contract price, rather than upon the producer.[24] Hence, the Staff, as the leading adversary,[25] generally adduced its evidence first, but it was always restricted to cost-of-

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Kline, *supra* note 14. The producers' thinking was akin to that of the Guatemala Indians who, despite their ostensible conversion to Roman Catholicism, continue to burn offerings to their pagan gods on the cathedral steps, just to avoid the risk of offending anybody!

[23] The leading case in this series is In re *Union Oil Company of California,* 16 FPC 100 (Dec. 6, 1956). On appeal, the decision was reversed by the 5th Circuit, not because of any basic disagreement with the conclusion of the Commission that the proof offered was insufficient but apparently because of a belief that the producer was entitled to know *in advance of hearing* what proof requirements he was expected to meet. The opinion is reported *sub nom.* Bel Oil Corporation v. Federal Power Commission, 255 F. 2d 548, 555 (1958):

> "The petition is granted to the extent that the Commission is directed to reopen these proceedings to afford petitioners reasonable opportunity to adduce such evidence *as they may be advised* is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable." (emphasis added)

It is this writer's opinion that the italicized language contemplated advice *by the Commission.* Cf. Kintner, Earl W. "Federal Administrative Law in the Decade of the Sixties" 47 A.B.A.J. 269, 271:

> "However, this need for flexibility does not lessen the continuing need for reasoned articulation of decisions, whatever the mode of their promulgation, for one of the major tasks of a regulatory agency is to educate those who are regulated."

[24] Bel Oil Corporation v. Federal Power Commission, Note 17 *supra,* at 554:

> "Section 5(a) places the burden on the Commission or other moving party to prove the initial rate unjust or unreasonable."

The Commission's Chief Examiner Marsh has reasonably construed that type of holding to place the burden of proof *upon the Staff:*

> "But it was pointed out by the Commission that such a method of approach [a Section 5(a) rate investigation] would in the latter event place *upon the Staff* the burden of proving that the applicant's rate or rates are unreasonable, * * *"

In re *Sunray Mid-Continent Oil Company,* 19 FPC 621, 632 (1958), aff'd. by the Commission at 19 FPC 618. The Staff, however, often disclaims that burden of proof. See, for example, the statement of Staff Counsel Abraham R. Spalter at p. 6432 of the transcript In the Matter of *Champlin Oil & Refining Co.,* Docket Nos. G-9277 et al:

> "I think Mr. Munn is putting on the blinders, because he keeps referring to the fact that the Staff has the burden of proof in this case. I will never admit to that, that the Staff has any burden of proving that Champlin's rates are unjust and unreasonable. That is not the purpose of the Staff's participation in these proceedings."

[25] Commissioner Connole, dissenting In re *Seaboard Oil Company,* 19 FPC 416,

service calculations and nothing more.[26] After wrestling with the producer rate problem for six and one half years in the *Phillips* case, since its 1954 remand by the Supreme Court, the Commission issued its decision in September, 1960, announcing, in effect, that its Staff's unrelenting efforts to apply a cost-of-service approach to producers had all been a waste of time, except perhaps to the extent that the applications of the method serve as a wonderful horrible example!

As the long-awaited "test case," the *Phillips* opinion produced two major conclusions: first, that the cost approach is "not a sensible, or even a workable method of fixing the rates of independent producers" and is one which "will produce fallacious results." [27] Second, to the consternation of those who had pre-

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430 (1958) expressed a rather idealistic view of the Staff's position in proceedings before the Commission:

> "Our Staff has no existence apart from the Commission. They are not competing adversaries, pitted against applicants before the critical eyes of the Commission. Rather they act as our eyes and ears and fingers, probing and reaching for the truth."

In practice it doesn't work out that way. Experience in rate proceedings before the Commission dispels any belief that the Staff is something less than a formidable adversary to the producers. As lawyers, we are of course used to the adversary system, and a description of the Staff as an "adversary," which I believe to be accurate, is not malicious or uncomplimentary. It is an appraisal of the administrative process as it actually works.

[26] In the light of public statements by the members of the Commission to the effect that the issue of regulatory method dwarfed all other questions in independent producer cases, the singular devotion of the Staff to cost-of-service calculations is somewhat incredible. Mr. Harvey J. Alexander, a very competent Staff witness, testified In re *Champlin Oil & Refining Co.*, Docket Nos. G-9277, G-9280 at p. 2718 of the transcript:

> "First, I would like to point out that these rates being predicated upon cost are, in my opinion, *automatically* proper."

The extreme adherence to that regulatory method—regardless of where it seemed to lead—is illustrated by the Staff's recommendations In re *Continental Oil Company*, Docket No. G-16966. In the Staff's Exhibit 16 in that case there were shown two sales of gas, both in western Kansas. Under Rate Schedule 112, Kansas-Nebraska purchased gas for 11 cents and under Rate Schedule 140 Cities Service purchased gas for 12 cents. Applying the cost-of-service approach, the Staff submitted a recommendation that the first rate be changed from 11 cents to 56.2 cents and that the second rate be changed from 12 cents to 2.7 cents. Alternatively the Staff recommended that, if the producer should be determined to be entitled to retain certain so called "tax benefits," then the rates should become 91.3 cents for the first sale and 3.5 cents for the second.

[27] Opinion No. 338 In re Phillips Petroleum Company, 24 FPC 537, 545:

> "In his concurring opinion in Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, Justice Jackson anticipated the chaos of such a situation when he stated at page 610:

judged the issue and somehow subjectively decided that current producer prices are *above* a "just and reasonable level,[28] the Com-

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> "'To let rate-base figures, compiled on any of the conventional theories of rate-making, govern a rate for natural gas seems to me little better than to draw figures out of a hat. These cases confirm and strengthen me in the view I stated in the *Hope* case that the entire rate-base method should be rejected in pricing natural gas, though it might be used to determine transportation costs. These cases vividly demonstrate the delirious results produced by the rate-base method. These orders in some instances result in three different prices for gas from the same well. The regulated company is a part owner, an unregulated company is a part owner, and the land owner has a royalty share of the production from certain wells. The regulated company buys all of the gas for its interstate business. It is allowed to pay as operating expense an unregulated contract price for its co-owner's share and a different unregulated contract price for the royalty owner's share, but for its own share it is allowed substantially less than either. Any method of rate-making by which an identical product from a single well, going to the same consumers, has three prices depending on who owns it does not make sense to me * * *'"

[28] See, for example, the unsupported conclusion of Fortune Magazine, *supra* Note 4 at 262:

> "The time has long passed when it can be fairly contended that the producer isn't getting a reasonable price for gas, * * *"

Similarly Dean Landis, *supra* Note 2 at p. 55 seemed to be concluding that current prices were to high because they exceeded prices of yesteryear:

> "The recent action of the Commission on September 28, 1960 in promulgating area rates, whether ultimately legal or not, has come far too late to protect the consumer. The area prices there set forth substantially reject the rate base approach and the fixed area prices come close to approximately current maximum prices, which have more than doubled in the past five years."

Cf. the dissenting opinion of the very able Circuit Judge John R. Brown in The United Gas Improvement Company v. FPC (5th Cir. Feb. 22, 1961), 290 F. 2d 133, 138:

> "The Court is vague as to the infirmities of the proof. It points out that United's system-wide average cost was 11.7¢ mcf and that United had been purchasing gas in 1954 at a price from 9 to 12¢ mcf. With so much water over the dam since 1954, I am at a loss to understand how that year has anything to do with a 'line' in 1958."

Further Judge Brown brings the subject back to earth when he says:

> "The opinion mistakenly delineates the mission of the FPC and a reviewing court as one to hold down prices. It erroneously equates regard for the protection of the ultimate consumer with some character of duty to prohibit price increases. * * *
>
> "What, and all it need consider, is the price which will be just and reasonable to producer, consumer and the public alike. * * *
>
> "But what American industry and its exploding metropolitan-based population needs is not such politico-economic platitudes. What it needs is gas."

Of course no man can pass intelligent judgment upon the propriety of a producer gas price without assuming some sort of a standard by which to make that judgment. Commissioner Connole pointed this out vividly in his address "Threshold Prices: a Practical Proposal for Producer Pricing" delivered to the Society of Gas Operators in New York City on October 23, 1958:

> "My point is not that the level of producer prices which pipelines have had to absorb is too high. No one knows better than I that any judgment on

mission revealed that its multitude of cost studies "show that gas has been, in almost all instances substantially underpriced." [29]

With the *Phillips* case going strong in the first ring, the main act of the circus proceeded with the "Tennessee Complaint Cases" in the second ring.[30]

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the substantive merits of today's producer price level would suffer from serious handicaps. The industry and regulatory community are far from agreed on any test that would accurately answer this question."

[29] *Phillips* opinion, *supra* Note 5 at p. 546:

> "This fact is now abundantly clear: Regardless of variations in allocation methods, allowance for incentives, and other disputed factors, computations of the cost of natural gas which have been presented in the many cases before us, show that natural gas has been, in almost all instances, substantially underpriced."

Those experienced in the economics of the gas producing industry were not surprised at this conclusion. For example, Mr. Earl W. Pierson, a partner in Arthur Andersen & Co., testified in October of 1958 In re *Champlin Oil & Refining Co.* Docket Nos. G-9277 and G-9280 at p. 5066:

> "Historically, gas moved from the position of a waste produce to that of being considered a by-product of oil, and in some instances of the extraction of liquefiable hydrocarbons, so that the objective of management was still to recover such revenue as could be incidentally picked up through the sale of the gas. With the further progress of industry in the design of feasible means of long-distance gas transmission, gas has advanced from the status of a by-product to the status of a joint product. Through this period of transition gas has been historically sold under long-term contract commitments which have obviously had the tendency to restrain the degree of price acceleration that would have been present had gas been priced on a day to day basis as is the case with oil. Because of that economic history, it is, in my opinion, quite possible that gas is today in fact selling below its cost and that it is underpriced in comparison with the other hydrocarbon products."

Based on the same background of intimate familiarity with this basic industry, Mr. Stanley P. Porter, a partner in Arthur Young and Company, who had conducted a study of "industry costs" had testified in the *Omnibus* hearing, In the Matter of *Champlin Oil & Refining Co.*, et al Docket Nos. G-9277 et al, at p. 3410-LC:

> "Q. Having concluded this very comprehensive industry-cost study, Mr. Porter, have you reached any general conclusions
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> "A. Yes. I have not changed my opinion about the inappropriateness of attempting to fix the price of gas, in the field, based upon a determination of its cost. However, I have concluded that, if this Commission voluntarily or involuntarily decides to use a determination of costs, it must recognize that it is thereby accepting the responsibility of undertaking one of the most complex cost accounting problems ever presented to a regulatory agency. It must also recognize that it will probably find gas *costs* generally to *exceed* current market *prices* for gas and that such fact must not be permitted to serve as a reason for using improper or illogical cost accounting methods. The costs determined by the most reasonable and logical methods should be accepted and placed in balance with other factors which the Commission, at its command, may have to utilize in exercising its responsibility to review producer prices."

[30] On August 31, 1955 the Tennessee Public Service Commission and a group of cities in Tennessee filed a series of some 16 complaints under Section 5 of the

Because much of the anticipated evidence in those related proceedings would simply be repeated sixteen times if they were all heard separately, the Commission consolidated a number of them, for the introduction of evidence common to all, into the "Omnibus" hearing.[31] The Federal Power Commission reported to the Congress that it had high hopes for this massive undertaking.[32] The hearing adjourned on March 31, 1959, about two and one half years ago, but to date there has been no decision of any of the cases included in the Omnibus hearing and, now that we have entered the "area price" era, none appears likely.

The press has widely asserted that the FPC has solved the producer regulatory problem by the establishment of "area price standards" [33] or by the announcement of an "area pricing for-

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Natural Gas Act against various independent producers selling gas to Tennessee Gas Transmission Company, alleging that the rates charged by the producers were excessive.

[31] In re *Champlin Oil & Refining Co.* et al Docket Nos. G-9277, et al.

[32] 1958 Annual Report of the Federal Power Commission to the Congress of the United States, p. 78:

> "The 'omnibus' hearing was expected to assist the Commission materially in meeting the difficulties inherent in the determination of just and reasonable rates for independent producers and in selecting appropriate methods and standards to be used in making such decisions."

[33] Actually the use of the term "standards" as applied to this announcement is a misnomer. All that the Commission did was announce publicly the guide levels which it would use in deciding whether to suspend a rate (which would simply institute a hearing and decide nothing) or whether to impose a rate condition on the issuance of a Certificate of Public Convenience and Necessity in the absence of proof justifying a higher initial rate. These guide lines were announced in the form of a "Statement of General Policy No. 61-1" issued on September 28, 1960 simultaneously with the issuance of the *Phillips* opinion. In that statement the Commission said:

> "In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and in the available markets for the gas."

Though certainly comprehensive, such an explanation is hardly illuminating. It is tantamount to saying that the Commission considered all it had ever heard on the subject. If indeed such consideration consisted of something more than the mere "feel" for the appropriate guide lines, an explanation of the reasoning process of the Commission might provide a clue to the criteria to be utilized if any exist in intelligible form. This would be appropriate "for one of the major tasks of a regulatory agency is to educate those who are regulated." Kintner, *supra* Note 23. The importance of the request here made for articulation of administrative reasoning to a degree where it can be examined has recently been emphasized by President mula." Even some courts have been similarly misled.[34] In my judgment nothing could be further from the truth. Area prices are not a "standard" or a "formula" at all. Not a single "area price" has been determined by any criterion to be "just and reasonable." The first area price hearing was ordered for the Permian Basin. The New York Public Service Commission describes the process as an "uncharted jungle" and I find that difficult to dispute.[35] At the recent conclusion of the first area prehearing conference in Midland, Texas, Chief Examiner Marsh filed his report with the Commission observing:

> "The principal causes for the failure of the conference to achieve more meaningful results were first, the uncertainty as to what evidence would be desired and, secondly, inadequacy of preparation." [36]

Of course, the second cause is a direct result of the first. It is very difficult to prepare evidence until one knows what evidence to prepare.[37] Since then the plot has thickened. With an industry,

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Kennedy in his April 13, 1961 "Special Message on Regulatory Agencies" to the Congress of the United States:

> "Fortunately, from the beginning of American law, our judges assumed an individual responsibility for uttering the bases which underlay their decisions. This practice has made not only for conscientiousness in undergoing the travail of decision, but has invited examination of each proffered brick that would seek a place in the structure of our law. The adoption of this practice by the regulatory agencies would, in my opinion, tend to develop the law that they administer, as well as to be a continual challenge to each agency member to make his contribution to the advancement of administrative justice. I am requesting a wider adoption of this practice."

[34] See the majority opinion in The United Gas Improvement Company v. Federal Power Commission, *supra* Note 28:

> "However, we take notice of the fact that the log jam is now breaking, as witness the decision in the Phillips Petroleum Company case, F.P.C. Op. #333, and it may be hoped that appropriate formulas for resolving the other section 4 cases may soon be forthcoming. The Commission is at least making a strong bid to that end by the publication of its Area Price Level schedules."

[35] The Commission's *Phillips* opinion, *supra* Note 5, is now on its way back through the courts again and is pending on appeal before the Court of Appeals of the District of Columbia. In its brief filed therein, the New York Public Service Commission set forth its appraisal of the future of area prices:

> "At the present time there is no formula for such type of rate making nor any standards for the determination of what evidence . . . should be produced . . . or for the determination of just and reasonable area rates . . . The entire process is an uncharted jungle."

[36] In re Area Rate Proceeding Docket No. AR61-1, Presiding Examiner's Report of Prehearing Conference issued May 26, 1961, p. 16.

[37] Cf. Commissioner Kline's Comments, *supra* Note 14:

> "It is, of course, impossible to produce cost of service evidence in a certificate case until we first determine what type of cost evidence we desire."

a Staff and a presiding examiner completely confounded as to what to do in an area hearing, the FPC has now compounded the confusion by scheduling a second Area Hearing in South Louisiana and promising to schedule five more in 1962.[38] Perhaps the ultimate in the massive approach will come from the realization that much of the evidence at the area hearings will inevitably be duplication that could be obviated by the scheduling of an "omnibus area hearing." [39] The necessity for such an unmanageable gigantic nation-wide hearing to review the price of gas in any given producer contract should provide further proof of the total ineffectiveness of the administrative process in this area.

One other chapter in the story deserves brief reference even in this short paper. In February of 1956 the Supreme Court took occasion to point out that the Natural Gas Act did not contemplate rate *fixing* by the FPC but only a *review* of rates which would be fixed initially by agreements between buyers and sellers.[40] But in June of 1959 they retreated from that statutory interpretation by effectively imposing upon the FPC the burden of initial rate making before issuance of the certificate authorizing a new sale.[41] And, as if the lack of any recognizable substantive content to the statutory phrase "just and reasonable" (when applied to independent producers) were not sufficiently perplexing, the Court created a second meaningless concept. The Commission was told that, in certificating a producer sale, it need not concern itself with determining what price is "just and reasonable" but it should simply decide what price is "in keeping with the public interest."[42] To date nobody really understands what that denotes and, in my opinion, they never will because it has no intelligible meaning.[43] Indeed the "fuzzy" lingo employed in this field of law seems to skirt the edges of metaphysics.

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[38] The prehearing conference in the South Louisiana area hearing, Docket No. AR61-2, was held June 26, 1961. The plans for the five additional hearings in 1962 were revealed in a letter of May 5, 1961 sent by the Federal Power Commission to the House Appropriations Subcommittee, which is considering the FPC appropriation for fiscal 1962.

[39] Indeed the United Gas Improvement Company has formally advocated such a nation-wide industry hearing. In re *Area Rate Proceeding,* Docket No. AR61-2 et al, transcript p. 129.

[40] United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332, 341, 100 L. ed. 373, 385, 386 (1955):

> "These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.
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> "The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them.
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> * * *
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> "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (italics by the court.)

Where then is the escape from such a regulatory labyrinth?[44]

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[41] Atlantic Refining Company v. Public Service Commission of the State of New York, 360 U.S. 378, 390, 3 L. ed. 2d 1312, 1320 (1959):

> "It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a *'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7."

[42] Ibid. L. ed. p. 1321:

> "Where the proposed price is not *in keeping with the public interest* because it is *out of line* or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary."

[43] Cf. Judge Brown's analysis of the language, *supra* Note 28:

> "The term 'out of line'—nowhere found in the Natural Gas Act—is a handy colloquialism which, if it means anything at all, must convey the connotation of the more familiar term 'abuse of discretion'—i.e., is the proposed increase so great as to indicate arbitrary action without reasonable support in the practicalities of the regulated gas industry,"

with the construction placed on the court's language by FPC Examiner Daniel J. Kelly In re *Valley Gas Transmission, Inc.*, Docket Nos. G-19618 et al, which equates a price that is "in keeping with the public interest" to one that "would *probably* be just and reasonable if tested by rate-making standards in a rate proceeding." With still no determination of what "just and reasonable" means in this field, it will be interesting indeed to speculate about what "probably just and reasonable" means.

[44] A recent article in the Southwestern Law Journal puts the question squarely up to those who say that regulatory price fixing for gas producers is better than contract price fixing. The author there advocates that all producer contracts be converted to tariffs which of course would mean that any producer could file a higher price at any time, just the same privilege that utilities have, subject to review by the Commission. The argument seems perfectly logical *if* we put more faith in the ability of the regulatory agency to fix a proper price than we do in the ability of the contracting parties. But I suggest that, if any such proposal should be

For the FPC, the Chairman recently testified: "*Congress* should consider specifically the question of a rate formula applicable to independent producers. . . ."[45] A gas bill might help but this isn't truly the answer. If the FPC, with all its accumulated expertise, doesn't know how to contrive such a formula, what makes anyone think a group of congressmen, necessarily removed from the problem, could do any better?

I suggest that we ultimately have two courses open to us. One road is simply to return to the free American economy, reaffirming our faith in the system of private pricing of commodities[46] with which this country has risen to its present leadership of the free world. That would probably take more courage than exists in today's political climate, but there's a long row ahead. You will recall that many feared all sorts of dire consequences from the termination of federal rent control in the early days of the Eisenhower Administration, but the nation is better off for it. And the voices of despair proved more pathetic than prophetic. The other road will lead to *arbitrary* control in which gas at the wellhead is priced by the presumably enlightened whim of the regulators and without any really objective criteria.[47] Such administrative fiats

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adopted, the lack of any sensible regulatory criteria for independent producer rate making will only be emphasized. See Steves, Sterling W., "FPC Gas Tariff—Solution to the Rate Change Dilemma of the Independent Producer?" 15 S.W.L.J. 46 (1961).

[45] Kuykendall, Jerome K. testimony before the Senate Commerce Committee on S.666 hearings May 25, 1961.

[46] In its Phillips opinion, *supra* Note 5, at p. 542 the Commission quoted with approval the language of Justice Harlan, dissenting in the recent case of Sunray Oil Company v. FPC, 364 U.S. 137, 160:

> "A pipeline performs a service akin to those traditionally performed by public utilities. The independent producer, on the other hand, is unique among the objects of public-utility regulation because it is not engaged in rendering a service to the public in the conventional sense of that concept, but rather simply in selling a commodity which it owns. * * * "

As a result of a June 7, 1954 Supreme Court opinion, considered by many able lawyers to be strained to the point of error, the Federal Power Commission has been attempting to set a price for a *commodity*. This is not the traditional function of a utility regulatory commission. A legitimate fear of many is that, if continued, this precedent will open the door for government price fixing of all vital commodities, oil, coal, timber, gasoline, milk, bread, etc. One wonders particularly at the justification for this innovation against our traditional free economy price-making when it is borne in mind that "less than 10% of the price paid by homeowners for their natural gas goes to gas producers." Empire Trust Letter No. 57, p. 4 (Nov. 30, 1954) published by Empire Trust Company, New York City.

[47] Kintner, Earl W., *supra* Note 23:

> "If the business community subject to regulation can find no rationalization upon which to base expectations and make plans, then it is no wonder that claims of arbitrariness, of ineptness, and—yes—of outright dishonesty should

would probably be judicially characterized as the product of the "expert judgment factor," but would be effectively immune from review because not based upon any standards. The Commission would thus become a king who could do no wrong. This latter avenue is already being advocated at alarmingly high levels in our government and such recommendations are aggravated because coupled with the insistence that the Commissioners to wield the axe should be men of power and dedication rather than wisdom and impartiality.[48] The absence of rational regulation may be obscured by "getting tough" and appointing commissioners who are predisposed to lean heavily on one side of the scale that they are supposed to balance, but that is all we can expect from such an approach. It is incompatible with our traditional concept of a government of laws and not of men.

The attempt of the federal government to regulate the price of gas at the wellhead has, however, served one useful purpose—it has demonstrated that the administrative process simply is not adaptable as a substitute for all our economic functions. In the long run our free enterprise system will do the job better and this nation's energy requirements will be met at the lowest prices necessary for the purpose.[49] This capatilistic economy of ours has done the best job of pricing commodities of all the systems yet

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be heard in the land. The function of the expert is to explain. No one can be an expert who does not explain."

[48] Landis, James M., *supra* Note 2 at p. 58:

> "But primarily leadership and power must be given to its Chairman and qualified and dedicated members with the consumer interest at heart must be called into service to correct what has developed into the most dismal failure in our time of the administrative process."

[49] Dr. M. A. Adelman, a professor of economics at Massachusetts Institute of Technology, testifying in the "Omnibus" hearing, explained the classic functioning of our free economy as respects the pricing of natural gas:

> "The competitive market price in itself is the price which is sufficient, but no more than sufficient, to encourage exploration for new supplies which will be needed by consumers. Unlike a human observer, who can only attempt to see and estimate *some* of the forces of supply and demand, a market mechanism registers *all* of them: that is its purpose. * * * In gas production, there is no question of the positive relation between price and supply. As with any commodity, it is most difficult, if not impossible, to measure that relationship precisely and even more difficult to forecast. Like a giant calculating machine, competitive market price registers and weighs these variables of supply and demand, seeking to establish an equilibrium. Personally, I can see no escape from the competitive market price for any regulatory body which seeks to establish just and reasonable prices for natural gas."

In re Champlin Oil & Refining Co., et al., Docket Nos. G-9277, et al., transcript pp. 356-LC *et seq.*

devised by man. There are many people in the world today who condemn as ineffective both our economy and our concept of private ownership of natural resources. In my judgment they are wrong. Whether I burn gas as a consumer or sell it as a producer, I know that my long-term interests, and those of my country, will best be served by a forthright recognition that the administrative process is far less effective than the American system of private commodity pricing.

PROBLEMS IN REGULATION OF INTERSTATE OPERATIONS OF PRODUCERS UNDER THE NATURAL GAS ACT

By John C. Mason

General Counsel, Federal Power Commission

I think all of us would agree that the most important unresolved problem now before the Commission is that of producer rates, and by that I mean rates in both certificate and rate cases. Consequently, I propose to summarize the factors which I believe gave rise to the problem, to review the steps which the Commission has taken in its efforts to find a solution—and it *has been* making an effort, charges to the contrary notwithstanding—and, to make reference to other possible solutions proposed including thus far unsuccessful efforts to amend the Natural Gas Act.

I have nothing new to present concerning the question of jurisdiction over the producers but I think as a starting point we must realize that the Supreme Court's 1954 decision in the *Phillips* case which eventually brought them under the coverage of the Natural Gas Act did not settle the question whether the present provisions of the Natural Gas Act are adequate for regulation of independent producers. In fact, it did not take the Commission very long after the passage of the Act in 1938 to discover the practical difficulties which would be involved if jurisdiction were assumed generally over natural gas producers selling gas in interstate commerce.

Early in the administration of the Natural Gas Act, the majority of the Commissioners were of the opinion that the legislative history of the jurisdictional section of the Act was sufficiently unclear for them to reach the conclusion—beginning with *Columbian Fuel* in 1940 (2 FPC 200),—that "it was not the intention of Congress to subject to regulation * * * persons whose only sales of natural gas in interstate commerce * * * are made as an incident to and immediately upon completion of such person's production and gathering."

It is obvious from its actions that the Commission did not want to take jurisdiction over independent producers during the years

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[1] Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

prior to *Phillips*. What's more, many other people did not want it to either. This is clear from the almost continuous series of bills that were pending in Congress long before the Court spoke in 1954. It is true, of course, that no amendments to the Act relative to independent producers have been finally approved although two have been vetoed. Hindsight here is valuable for it indicates, to me at least, that a great many people saw that grave difficulties stood in the way of practical regulation of producers within the framework of the Act, whether or not Congress intended that it be done.

In any event, the independent producers were brought under the Natural Gas Act by the Supreme Court decision of June 7, 1954, in the *Phillips* case, and our myriad of producer difficulties date from that decision. To make this point clear, it is necessary to go back a few years in time to the now classic decisions of the court in the *Natural Gas Pipeline Company* case, 315 U.S. 575 (1942) and the *Hope Natural Gas Company* case, 320 U.S. 591 (1944). These cases affirmed the Commission's use of the prudent investment—rate base formula in fixing the rates for the sale of natural gas by the companies operating interstate pipelines, although some the pipeline companies were also producing their own gas. The opinion by Justice Jackson in the 1944 *Hope* case foresaw some of the difficulties attendant upon the regulation of interstate sales by producers. Even at that early date dissatisfaction with the fixing of rates upon natural gas production operations under the conventional utility rate base-cost of service formula began to appear.

About six weeks before the *Phillips* case was decided in 1954 the Commission issued its decision in *Panhandle Eastern Pipe Line Co.* (13 FPC 53) in which it broke with past practice of relying upon the rate base-cost of service approach and used a formula which permitted *Panhandle* to receive for its own produced gas a price reflecting the weighted average arm's length payments for identical gas in fields where it is produced. That is, the so-called "fair field price" formula.

About the time, however, that the Commission was beginning to consider fixing the rates of the independent producers, the "fair field price" approach was knocked out by the D.C. Court of Appeals in *City of Detroit* v. *F.P.C.* (1955), 230 F2d 810, cert. den., 352 U.S. 829. The court in its remand held that though the cost of service method is not the only one available to the Commission under the statute, it is essential that the evidence and findings show that the increase in rates permitted is no more than is reasonably necessary for the purposes advanced for such increase, and that the Commission in such a case should have before it the rate derived by that method, at least as a point of departure and a basis of comparison.

I deem it unnecessary in a gathering such as this to labor the proposition that, as a practical matter, the operations involved in the transportation of natural gas are so different from those involved in its production as to warrant the conclusion that the traditional cost-of-service, rate-base formula is, to say the least, more difficult to apply in fixing the rates of producers.

Unquestionably the Natural Gas Act was tailored to fit the pipelines, not the producers. This, when coupled with the judicial interpretations of the Act created the producer regulatory burden with which the Commission is now confronted.

Earlier, I mentioned the almost continuous series of proposals in Congress to exempt producers. With *Phillips* came two deluges. In the year preceeding *Phillips* we had 283 certificate filings and 706 rate filings. During the first nine months after *Phillips,* the Commission was swamped with *producer* filings (5673 certificate applications and 10,042 rate filings), and Congress was swamped with bills to exempt the producers. The latter began in 1953, following the Court of Appeals decision in *Phillips.* All will agree that the Commission's budget was wholly inadequate to cope with the producer work load resulting from *Phillips* and it was not until the period between 1957-1959 that the Commission obtained any substantial increase in appropriations to augment its staff after it became more apparent that the problem would not be resolved through legislation.

"Hope springs eternal," and there is no doubt in my own mind, at least, that the Commission and the staff gave preference to the tremendous pipeline work load in the long-held hope that the Court decisions would give the final push necessary to convince Congress and the Administration that the Natural Gas Act should be amended to cope with the produced problem. No one likes to admit to any foot-dragging, of course, and the numerous petitions to review the Commission's first producer orders were based upon plausible legal grounds, but everything during those first two years or more after *Phillips* anticipated that Congress would solve the riddle. But, as you are all well aware, it is not yet resolved.

I firmly believe that if everybody had accepted *Phillips* at its face value, and had knuckled down to the problems as they evolved in 1954 and 1955, an acceptable solution could have been reached by this time.

Had the "fair field price" formula been accepted by the Court, it is reasonable to suppose that we might have been able to apply it to independent producers as well as to the production properties of the pipeline companies. But since this was outlawed some other formula had to be found.

It might be well at this point to make a distinction that is often lost sight of. The application of the cost-of-service rate base method depends basically on original cost less depreciation plus an allowance for working capital, all of which can be determined with a high degree of certainty under the Commission's Uniform System of Accounts for pipeline companies. To these definite costs we apply an appropriate rate of return. Thus, with definite figures available, it is a relatively simple matter—and I say that advisedly—to determine a just and reasonable "price" for the sale of the "service" being rendered by pipeline companies.

The determination of a fair and reasonable "price" for the sale of gas by each individual producer raises quite a different problem. The producers are much more numerous than the natural gas pipeline companies, which seriously complicates administration of the Act. Furthermore, compared to a pipeline, a producer's plant in most cases is negligible. The producer incurs a lot of "costs" but they are not necessarily the type of costs which are easily and accurately ascertained from the books of each producer. The producer does have out-of-pocket expenses for which he is just as entitled to be reimbursed as the pipeline owner whose expenditures produced a tangible plant, *i.e.,* a rate base. Thus, even though "costs," *i.e.,* expenditures, must be taken into account no matter what formula is applied, it has become fairly apparent that additional factors will be considered.

With this distinction in mind, the Commission, still searching for a solution, issued on September 28, 1960, its General Policy Statement No. 61-1 (24 FPC 818). This statement laid out a broad program for regulating producer rates on an area-price basis. The Commission said that the ultimate objective of this plan is to set prices adequate to maintain gas supplies needed for the nation's consumers, but at prices no higher than necessary to accomplish that purpose.

The immediate purpose of the policy statement was to make the most effective use possible of the Commission's limited facilities in discharging the duties called for by the regulation of producers. The price levels set in the producing areas listed in the statement were intended to provide at least a "rule of thumb" approach to the consideration of proposed increases in producer rates and of proposed initial prices in certificate applications.

There is nothing final or sacrosanct in the price levels set but everybody (producers, purchasers, distributors, consumer State commissions, and the staff of the Commission itself) was put on notice that rate-increase filings containing proposed prices in excess of the levels set out in the statement would be suspended and that an effort would be made to condition certificates to hold the line at the levels specified in the statement for new service.

The immediate effect on the Commission's workload was salutary. For example, on November 15, 1960, the Commission terminated 83 proceedings in which the proposed rate increases, previously suspended, did not exceed the area price levels set in the policy statement. (24 FPC 950, 951)

Further implementing the policy statement, the Commission has now in progress two area-rate proceedings, the first involving the so-called Permian Basin Area in Western Texas and Eastern New Mexico and the second involving Southern Louisiana.

Time does not permit a detailed discussion of all that has happened since the first prehearing conference last May, in Midland, Texas, but I will attempt to outline the basic problems in the area rate proceedings as they appear to me at this time.

We have the basic problem of determining what evidence is *not* admissible. I do not see any basis in the Commission's orders issued to date for excluding any evidence that has a direct relationship to natural-gas production, transmission or sale in interstate commerce. A subsidiary question relating to the method of presenting basic data, whether by a representative group of producers or by questionnaire data to be supplied by the producers and compiled by the staff may have been resolved, at least in part, by the Commission's Permian Basin order of August 2.

Another very important unresolved problem is whether an area rate, once fixed, can legally be applied across the board under the so-called milk-shed price approach, or whether producers claiming higher cost will have a right to make a separate showing on a single-company basis in a subsequent proceeding in an effort to pierce the price ceiling fixed as a result of the area proceeding. Of course, we have the very basic question of whether it will be possible to arrive at a single rate in an area for both the initial rate in a certificate case and for increased rates under old producer contracts.

Last, but not least, we have the most basic question of all, namely, whether the area rate in whatever form it is finally determined will be sustained upon court review. Each of these basic questions concerning the legality and practicability of the area rate approach suggests to me that some measures may be taken to hedge against possible inadequacies of that method. Any suggestions you may have will be appreciated.

Recent Commission orders would seem to indicate that regulation is going to tighten up. While I am sure that the requirements of due process are not going to be ignored, I expect the Commission to continue to do all in its power to cut procedural red tape and move cases along as fast as possible.

Supporting data for proposed initial prices in certificate applications and rate-increase proposals will, I believe, be even more closely scrutinized than they have been in the past, but, at the same time there will be due regard for the legitimate needs of the industry. But those needs will have to be fully documented.

To date the Commission has not made its rules and regulations requiring natural gas companies to keep and maintain their accounts in accordance with the Uniform System of Accounts for Natural Gas Companies applicable to the independent producers. At the present time they are only required to submit a summary report with respect to sales and revenues for which they have rate schedules on file with the Commission. While I do not anticipate any immediate changes in this respect, I would expect consideration to be given to the imposition of additional accounting and reporting requirements on the producers.

I attach particular significance to the Commission's order issued August 2, 1961, requiring the producers in the Permian Basin area to file with the Commission in questionnaire form certain specified basic cost and operating data, with direction to the staff to put such individual company data in a composite form for introduction into the record in that proceeding. Cooperation of the industry in supplying the data may have a bearing on the need for additional accounting requirements.

The Commission order of July 21, 1961, denying Tennessee

Gas Transmission's application for temporary authority to install additional compressor capacity in Docket No. 16842 should not be ignored. I would expect the Commission to require a better showing in the future before issuing such temporary certificates. Of course, if we can speed things up, fewer "temporaries" will be needed.

In conclusion, it seems to me that the time has come for all segments of the regulated natural-gas industry to accept the fact that regulation is here to stay and for all of us to assume our respective responsibilities to see that regulation works, promptly and fairly. I have no doubt that the Commission intends to accomplish those objectives.

PERSPECTIVES ON THE ADMINISTRATIVE PROCESS

By James M. Landis

For me to have watched the growth of the administrative process has been, perhaps, the most exciting chapter of my life. My introduction to its existence came early under the tutelage of an imaginative scholar, now a Justice of the Supreme Court of the United States. We did not know too much of its operations at that time. The whole subject seemed to me then to have been confused by the writings of such men as Albert Venn Dicey and Ernst Freund, competent and original scholars searching by way of analogy for something to compare the rise of the administrative process in England and in the United States to the handling of similar matters in other nations. The "droit administratif" of France seemed to them a basis for comparison but never, in my opinion, a compelling one. The impact of administrative law to us in America was not, as in the jurisprudence of France, an issue between the government and the individual to which Dicey's famous phrase of the "rule of law" was applicable. Instead it was more like the rise of equity—a system for the protection of claims of individuals with which our existing judicial systems for administering justice had been unable to cope.

It was because of this belief in the efficacy of the administrative process that it was widely used in the thirties to protect and further the new claims that by then had reached the level of recognition. Some of those claims could possibly have been handled through our normal judicial agencies had the courts been abreast of their dockets or had they been adjudged by the Congress as adequate guardians of the newly-claimed liberties. This, for example, could have been true of the claim for collective bargaining. And yet here a distrust both of the attitude of the judiciary and of the cost and prolixity of judicial procedures led to a resort to administrative procedures. This was not true of other claims whose protection called for the creation of mechanisms far beyond the normal judicial duties involving simply hearing and deciding. This, for example, was true with reference to the claims of countless individuals impoverished by the methods employed in the twenties for financing from their savings the promotion of our system of private enterprise. New mechanisms had to be evolved and these mechanisms in turn had to be protected by those who had devised them.

This movement of expanding the administrative process has continued and is likely to be a continuing method for keeping economic society in balance, whatever the alleged philosophies of our rival political parties may be. To take only one simple illustration—the licensing of nuclear reactors. The prime factor in the issuance of these licenses revolves about the safety of the proposed site and the safety of the proposed construction. To subject that issue to a theory of common law pleading, that despite all our reforms is still basic to the judicial process, to lodge the ultimate determination of such an issue in the hands of district judges, is hardly a method that would fit even the vast equity powers that Lord Mansfield succeeded in vesting in those courts.

Administrative determination of these and many other issues has thus become a necessity. The procedures that must be employed for their determination will have to vary. This is a simple fact too often neglected by the organized bar. The bar has assumed, as in the Administrative Procedure Act of 1946 and in its projected Code of Administrative Procedure, that certain procedural requirements can uniformly be imposed upon the many and variegated regulatory agencies that today comprise the federal administrative process. Nothing is further from the fact. Only recently, for example, I had occasion to consider how best to deal with the complicated issue of safety in the licensing of nuclear reactors by the AEC. Traditional legal assistance in terms of the exploration of issues, in terms of the presentation of evidence, in terms of the right of intervenors to question the validity of data and opinions that might be expressed, are essential. These are part of the disciplines inherent in the legal profession. But the ultimate determination must rest on considerations completely foreign to those that are part and parcel of the training of a lawyer. And consequently, I felt it wise to suggest that in addition to the hearing examiner, there be added two scientists conversant with the general problems and competent by virtue of their training to evaluate the complicated data relating to that issue of safety—a procedure presently unavailable under the Administrative Procedure Act.

I cannot stress too emphatically the need inherent in the administrative process for the utilization of disciplines other than law. Even in the disposition of what we deem ordinary legal issues a need of this nature has become to be recognized. For centuries lawyers as such have tried to deal with problem of crime. Beginning with the old Mosaic concept of an eye for an eye and a tooth for a tooth and later moving to the concept of incarceration to protect society as such from its enemies, the attack on the reduction of the incidence of crime has been unsuccessful. The imposition of heavy and cruel penalties, such as characterized English justice at the turn of the last century; the attempt to grade various offenses in terms of first, second and third degrees, symptomatic of our early American jurisprudence and still embodied in it, have proved useless in their effort to deal with the problem. Unfortunately, other disciplines in this field have made too little progress and their errors have been high-lighted by a press unaware of the basic difficulties of the problem but believing that softness is the real danger and retribution is an answer.

Of course, there lies inherent in the law, whether administered by courts or by regulatory agencies, certain basic ethical standards and standards of fairness that must be observed. "Thou shalt not steal" has as much meaning in modern life as it did in the days of the desert wanderers. Its elaboration is to be found in our injunctions against false advertising, against stock-jobbing, in our provisions for stockholder suits. Adaptation of these basic concepts must, of course, continue. Even now, we are seeking ways and means to adapt basic principles to such problems as *ex parte* presentations and other efforts to influence the judgment of agencies that we have erected and nurtured on the theory that they should be independent. How far we are from coming to agreement on the articulation of these principles is evidenced by the continued debate on these matters in the Congress and the inability with any degree of unanimity to spell out the limits of appropriate conduct. Some few years ago executive action intended to sway the judgments of some of our independent agencies was severely and rightly critized. But only recently an effort to do the same thing emanating from a significant political personality in the Congress, threatening a Congressional inquiry in the event that a particular loan might be made under the Defense Production Act, although widely publicized, to my knowledge was never rebuked in a press that pilloried other members of the government for lesser interventions.

But I must return to what I conceive to be the crucial problems of the administrative process. The basic fact is that it must succeed in pursuing its prescribed objectives. If these are deemed undesirable, opposition to them can rightly concentrate upon thwarting them. There is, however, a wide-spread tendency to prevent attaining them by hobbling and destroying the efficiency of the administrative process. Let me illustrate my meaning. A Presidential plan for the reorganization of the FCC was recently presented to the Congress. Under the Reorganization Act of 1949 such a plan becomes law in the absence of its disapproval within sixty days after its presentation. The plan itself was overwhelmingly defeated. An analysis of that event throws considerable light on the general problem of administrative reorganization. All the networks, the National Association of Broadcasters, the Federal Communications Bar, opposed this reorganization plan. The networks have a vested interest in the status quo. Their opposition stemmed not from a belief that the plan would not work, but from a fear that it might work too well. Their fears related to the potentiality that the license renewal requirements might really be made workable. Promises of public interest programming are soberly made at the time when a license is originally sought. But when it comes to a renewal of a license or even the transfer of a license, no inquiry as to whether performance has or did measure up to those promises has ever seriously been made.

The Federal Communications Bar in a sense has the same interest. The complexity and prolixity of the existing procedures redound to the benefit of its members. From substantially any action of the Commission, lawyers can appeal a cause, no matter how insignificant, to the Commission as a whole and demand the right to oral argument before the Commission. Even prior to such a determination counsel can, under existing rules, drag out proceedings before hearing examiners and with exhibits and testimony draw out issues beyond all reasonable bounds.

There are what I have previously called Alice-in-Wonderland procedures, reminiscent of the vested interest that the bar of the eighteenth century had in the procedures then prevalent in England. With the advent of a new and energetic Chairman of the FCC, determined to give some realism to this fairyland, opposition concentrated on procedure rather than substance. It developed slogans, such as "czarism," "executive domination of independent agencies," "reorganization by executive decree," and even "sovietizing our government." Of course, nothing is further from fact. The substance of the matter is simple. Given a limited number of frequencies, the problem of government is to see that they are used as effectively as they can be used in the public interest rather than being employed in the interest of some purveyor of toothpaste or a deodorant. But this basic issue was concealed beneath an unreal procedural battle.

The same situation—a desire that the administrative process should not work efficiently—was manifested in the defeat of a reorganization plan devised for the NLRB. With some 23,000 cases now annually crowding the docket of that agency, the ability of expeditiously handling them is simply beyond the human capacity of the members of that agency. And yet in this area, more so than in many others, expedition is of the essence. Representation and unfair labor practices cases cease to have much meaning if they grow too old. The defeat of that reorganization plan can easily be proved to have been due to considerations having no relationship to the improvement of the administrative process but having a relationship to two factors, first political opposition pure and simple, and secondly the desire to thwart the basic principle of the National Labor Relations Act in its assertion that collective bargaining should be the foundation of labor-management relations in our economy. As one witness for the National Association of Manufacturers bluntly put his reasons for opposing the plan: "One man's delay is the other man's due process."

I cite these illustrations simply as instances of the growing pains that inevitably accompany the administrative process. They derive more from opposition to the substantive laws entrusted to administrative agencies rather than genuine opposition to the betterment of administrative procedure.

If we turn our attention to the procedural phase of the administrative process, the prime diffculty that attaches to it is the factor of delay. It is, of course, an old and common saying that justice delayed is justice denied, but the fact that such a saying is shopworn does not detract from its essential truth. Delay is thus equally an element of the lack of due process as those procedures which the Administrative Procedure Act and the proposed Code of Administrative Procedure have sought to correct. Indeed, I think this lack of expedition is far more serious than defects that occur in the administrative handling of controversies. A casual scanning of recent instances where courts have been called on to review administrative action on grounds of due process show relatively few cases where the appellant has been successful. The calendar of the Supreme Court of the United States of those cases in which *certiorari* has been granted show a far greater preponderance of cases revolving about the abuse of the judicial process than of the administrative process. And yet the lag in the administrative disposition of its business approaches a national scandal, whose impact affects not merely individuals but the health and well-being of vast industries.

To date the bar has not seriously and studiously considered this problem or risen in its majestic wrath to demand its cure. The problem fortunately has now gained the attention of the Congress. Reorganization of two agencies, the CAB and the FTC, have been accomplished despite opposition that was primarily political. Only a few days ago, despite the defeat of the reorganization plan for the FCC, legislation to accomplish much the same end was approved by the Houses of Congress and is presently in conference. In the Senate, Senator Carroll has introduced, and his subcommittee is working on, a bill that, with some slight amendments, can affect significant improvements. No longer does the Administrative Procedure Act have about it an aura of untouchableness as if it had been brought down from Mount Sinai.

These stirrings have their echo in the administrative agencies. In the NLRB a radical reform in the handling of representation cases has significantly reduced the time involved in their disposition. The FTC has overhauled its entire structure in an effort to cure the time lags that heretofore have characterized much of its work. The ICC has made radical changes enabling it to dispose of some 16 to 18 thousand cases without a requirement for action at the Commission level. Progress, less significant in its impact, has taken place in the SEC, the FCC and in the FPC. Reorganization of the Federal Maritime Board to permit it to perform functions originally delegated to it but substantially neglected has passed the House of Representatives and is now pending in the Senate.

This issue of administrative efficiency centers primarily about what Ralph Waldo Emerson remarked was the central tragedy of life, namely that there were only 24 hours in a day. Congress in all good faith, but without recognizing the limitations of human energy, has imposed too many responsibilities upon these agencies whose disposition requires not merely action by the agency, members but by the agency in *banc*. Delegation is thus a prime necessity if expedition is to be obtained. The essence of the President's reorganization plans has centered on this fact. These plans have been criticized on the ground that standards governing the degree of delegation both in rule-making and in adjudication were not sufficiently enunciated. But I submit that it is far wiser to permit the agencies, out of their experience, to evolve those standards than to try and fasten certain standards upon them by legislative fiat.

These plans have been criticized again upon the ground that they permitted delegation of the rule-making function, but I submit when one considers the breadth given to the concept of rule-making by the Administrative Procedure Act, no other approach is a truly realistic one.

These plans have also been criticized on the ground that they took away the right of appeal from an examiner's decision and substituted for it a system of discretionary review. When one considers the mass of fundamentally minor cases appealed to the agencies and the time consumed in the disposition of these cases at the agency level, there is no other practical answer. Of course, concomitant with such a reform must go an improvement in our corps of hearing examiners and agency staff members. If this can be accomplished by enhancing both their financial status and their general standing, the cost would be negligible in terms of the savings to the public and industry possible by the expeditious handling of administrative matters.

Finally, these plans have been criticized on the ground that they permitted the chairman of an agency to deploy the personnel of that agency in such manner as he might deem wise so as to handle effectively those responsibilities that the agency as a whole had determined should be delegated. Here is where the charges of "czarism," of executive interference with the independence of the agency, found matter upon which to feed. Here is where in the case of some agencies, such as the FCC, the pique of members, other than the chairman, was aroused. Of course, this flexible power to deploy personnel increased the power of the chairman and such a power could potentially be abused, for the lodgment of power always presents a possibility of abuse. Such safeguards as could be devised had, however, been written into the plans. The existence of these safeguards, however, was ignored by men of respectability who attacked this feature of the plans on the ground that the entire functions of the agency could potentially be delegated to one of its janitors. To paraphrase Mark Anthony: "The nonsense that men utter in the course of political battles reflects slight credit upon their intelligence."

This issue of the extent to which delegation should be carried is not dead, for it is integral to the issue of delay which, absent delegation, will continue to haunt us. Its resolution, I hope, will not be by the imposition of Procrustean standards in the manner of the Administrative Procedure Act. The extent to which one agency may find delegation desirable may well be far different from that of another. Not only will it rest on the nature of the matters handled by the agency but on the quality of its subordinate personnel. As a distinguished barrister is reported to have said in opening his argument upon an appeal: "My lords, there are reasons for reversing the decision below, other than the fact that it was made by Mr. Justice Kekewich."

One further word upon this issue of delay. Procedures naturally have a definite bearing on it. The absence of pre-hearing conferences, complacency in permitting adjournments, laxity with respect to the introduction of purely cumulative evidence, the resort to oral evidence which could be easily supplanted by written statements, the inability to dispose of interlocutory motions, prolixity in the findings of examiners, all have a bearing on this issue. All have rightly been the concern of the organized bar and remedial measures have been adopted in many agencies. But there is a deeper question than this—the development of procedures of a non-judicial nature that are more readily adaptable to the resolution of issues arising in complicated administrative proceedings. I have heretofore noted several situations in which the traditional procedures seem not only cumbersome but unlikely to develop the shape of the real problem. The award of air routes is one; mergers in the transportation field is another; the licensing of nuclear reactors is a third; area rate-making in the field of natural gas production is a fourth. This enumeration could be considerably expanded, but it is sufficient to illustrate the problem, for the issue in these cases is fundamentally that of reaching a sound business judgment that takes into account the public interest. In order, for example, to determine whether additional competition is desirable in the public interest with respect to air traffic between Dallas and Los Angeles, is it really necessary to go through weeks and months of hearings and take reams of testimony, have findings eventually by an examiner, and then reargue and re-decide the case upon an appeal?

I am aware that a suggestion of this character will provoke considerable opposition and I am aware that as yet no satisfactory procedures have been formulated to deal with these issues. As for the provocation, it might be well to remind ourselves of the tirade in the *Mirror of Justices* against what then was the modern tendency of supplanting trial by ordeal with trial by jury. As to the development of specific procedures, our ingenuity must reach for what, to the bar, is truly outer space. I have hopes, for example, that the Administrative Conference of the United States, with its unique combination of administrators, lawyers and political scientists, will turn its attention to this problem and evolve at least experimental answers. As an organization that Conference deserves the whole-hearted support of the bar. Its interest cannot be in the substantive problems committed by law to the regulatory agencies, but only in the efficiency and fairness by which these agencies achieve their statutory goals.

I have touched on problems which are likely to stir both controversy and dislike. I hope that is the case, for complacency with regard to these issues will simply increase the pallor that has spread across the broad field of regulation. These areas of regulation seem, in part, to lack the challenge that they once had. They seem somehow no longer, with obvious exceptions, to attract the Cooleys, the Eastmans, the Kennedys, the Douglases, the Franks, the Aitchesons, the McNinches, and too often faithful and competent service in these fields has gone unrewarded. Perhaps, I am merely growing old and, like an elder alumnus, labor under the erroneous belief that the race of giants has withered. But, at least, all of us can and must possess a youthful outlook towards the administrative process itself. Compared with the evolution of law and of equity, that process is still only in its swaddling clothes. But it is a lusty infant, growing daily in vigor and force. Its ability to further our democratic society and hold together the forces of private enterprise to work for the general good, is the great issue that is at stake. It consequently demands the full attention of the organized bar as well that of other and newer disciplines whose objectives are also the realization of goals that combine the search for private gain, with an understanding that it must also embrace the public good.

JUDICIAL REVIEW AND THE FCC: A LEGISLATIVE HISTORY

By Ernest Jennes

Chairman, Subcommittee on Communications Act, Committee on Judicial Review

1. Section 16 of the Radio Act of 1927

The Radio Act of 1927 represented the first attempt by the Congress to regulate wireless broadcasting. The Radio Commission was set up for this purpose. Appeal from its decisions was provided for in Section 16 of the Act which read as follows:

> "Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals for the District of Columbia; and any licensee whose application is revoked by the Commission shall have the right of appeal from such decision of revocation to said Court of Appeals for the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within 20 days after the decision complained of is effective, notice in writing of said appeal and the reasons therefore. . . ." Radio Act of 1927, § 16, 44 Stat. 1162

Section 16 also allowed the reviewing court to hear additional evidence, but limited its revision to the points set forth in the reasons for appeal. There was no provision for further review.

The original House bill, H.R. 9971, contained no appeal provision. Moves were made in both the House and the Senate to introduce such a provision. Mr. Davis, a member of the House Committee on Merchant Marine and Fisheries which reported on this bill, offered the following amendment on behalf of the Committee during the House Debate on March 13, 1926:

> "Any applicant for a permit or license whose application is refused by the Secretary of Commerce, and any holder of a license revoked by the Secretary of Commerce, shall have the right to appeal from such refusal or revocation to the Court of Appeals for the District of Columbia by filing with said court within 20 days after the decision complained of is effective, notice in writing of

> said appeal and of the reasons therefore. . . ." 67 Cong. Rec. 5566 (1926).

Mr. Celler would have amended this amendment to allow all appeals to go to the United States district courts. Mr. White stated that the Committee considered it would be unconstitutional to impose the administrative and legislative functions of Section 16 upon the federal district courts. He cited the precedent of appeals from the Commissioner of Patents which go to the Court of Appeals for the District of Columbia. Mr. Celler's amendment was defeated.[1] Mr. Griffin then offered an amendment to the amendment which would have allowed appeals from refusals of licenses to be made in the Court of Appeals for the District of Columbia appeals from revocation of licenses to be made in the district court in which the station was located. In the discussion on this amendment, the distinction was drawn between actions initiated by an applicant where the burden was on him to pursue his application and actions initiated by the Commission. In the latter case it seemed unfair to force the licensee to go to Washington, together with his witnesses and attorney, to prosecute his appeal. This amendment was also defeated.[2] Mr. Davis' amendment was agreed upon.[3]

Senator Robinson introduced an amendment concerning appeal from Commission decisions in the Senate on June 30, 1926.[4] It was substantially the same as the final appeal provision. The Senate agreed to the amendment on July 1, 1926.[5]

The Senate Conference Report on H.R. 9971 had this to say about Section 16:

> "Section 16 provides for appeals and is a compromise between the views of the two Houses. By the terms of the House bill, all appeals were to the Court of Appeals for the District of Columbia. Under this provision, all appeals except as to revocation of licenses go to the Court of Appeals for the District of Columbia. Appeals upon questions of revocation may be taken either to the Court of Appeals for the District of Columbia or to the district court of the United States in which the station and the apparatus covered by the license is located. This latter provision appeared in the Senate amendment." S. Doc. No. 200, 69th Cong., 2d Sess. 18 (1927).

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[1] 67 Cong. Rec. 5567 (1926).

[2] 67 Cong. Rec. 5568 (1926).

[3] 67 Cong. Rec. 5584 (1926).

[4] 67 Cong. Rec. 12354-55 (1926).

[5] 67 Cong. Rec. 12508 (1926).

2. 1930 amendment of Section 16 of the Radio Act of 1927

The text of Section 16 of the Radio Act of 1927, as amended in 1930, was as follows:

> (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By an applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission.
> (2) By any licensee whose license is revoked, modified, or suspended by the Commission.
> (3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license. . . ." Act of July 1, 1930, § 16, 46 Stat. 844.

Section 16, as amended, also limited review to the facts and evidence before the Commission. In addition, it specifically provided for appeal by certiorari to the Supreme Court of the United States.

The original bill, H.R. 12599, was introduced in the House and referred to the House Committee on Merchant Marine and Fisheries on May 24, 1930.[6] It was reported back to the House without amendment on May 27, 1930.[7] The report said that:

> "The purpose of the amendment is to clarify the procedure on appeal from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decision of the Court of Appeals for the District of Columbia by the Supreme Court." H. Rep. Rep. No. 1665, 71st Cong., 2d Sess. 2 (1930).

The bill was debated in the House and passed on June 30, 1930.[8] Mr. Davis, a member of the House Committee on Merchant Marine and Fisheries, said that the amendment was required because:

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[6] 72 Cong. Rec.9521 (1930).
[7] 72 Cong. Rec. 9496 (1930).
[8] 72 Cong. Rec. 11530 (1930).

> "Under its interpretation of the appeal provision in the existing law the Court of Appeals for the District of Columbia assumed [sic] to perform the function of a super-radio commission, substituting its judgment and discretion for that of the Federal Radio Commission. The Supreme Court upheld the court of appeals in this interpretation, and also held that the judgment of the court of appeals was final, as the appeal provision in the law had in effect made an administrative body of the court of appeals. . . . so that the Supreme Court was not given jurisdiction of such appeals, and the Supreme Court would not grant a writ of certiorari to bring such a case before the Supreme Court." 72 Cong. Rec. 11530 (1930).

The bill was introduced in the Senate and referred to the Senate Committee on Interstate Commerce on June 24, 1930.[9] It was reported back to the Senate without amendment on June 26, 1930.[10] The bill was debated in the Senate and passed on June 27, 1930.[11] Senator Couzens, in explaining the bill to the Senate, gave the same reasons for its enactment as Mr. Davis had given the House. In neither instance was there any discussion of the concentration of appeals in the Court of Appeals for the District of Columbia.

3. Section 402 of the Communications Act of 1934

The Federal Communications Commission was created by the Communications Act of 1934 to regulate communications, both by wire and by wireless. Appeal from decisions of the Commission was provided for in Section 402 of the Act. This section originally read as follows:

> "(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the order of the Interstate Commerce Commission, are made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio

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[9] 72 Cong. Rec. 11553 (1930).

[10] 72 Cong. Rec. 11749 (1930).

[11] 72 Cong. Rec. 11881-82 (1930).

> station license, or for modification of an existing radio station license), and such suits are authorized to be brought as provided in such Act.
>
> (b) An appeal may be taken in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals for the District of Columbia in any one of the following cases:
>
> (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
>
> (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." Communications Act of 1934, § 402, 48 Stat. 1093 (1934).

S. 3285, the bill finally enacted as the Communications Act of 1934, grew out of hearings on S. 2910 and H.R. 8301 held earlier in the Second Session of the 73d Congress. Hearings on S. 2910 were held before the Senate Committee on Interstate Commerce in March, 1934. The original appeal provision in that bill read as follows:

> "Suits to enjoin, set aside, annul or suspend any order of the Commission under this act shall be brought in the several district courts of the United States and the provisions of the District Court Jurisdiction Act (38 Stat. 219) are hereby made applicable to all such suits, and all references in said act to the Interstate Commerce Commission shall apply to the Commission. . . ."

E. O. Sykes, Chairman of the Federal Radio Commission, in testimony before the Committee on March 9, 1934, suggested that the following provisions be added at the end of the above excerpt from S. 2910:

> ". . . except as to (1) any order denying any application for renewal of any existing radio license, or (2) any order revoking such license.
>
> (b) An appeal may be taken in the manner hereinafter provided from orders of the Commission to the Court of Appeals for the District of Columbia in the following cases:
>
> (1) By any applicant for renewal of an existing radio station license whose application is refused by the Commission.

> (2) By any licensee of a radio station whose license is revoked by the Commission. . . ."

In addition, his proposed amendment included the procedural provisions of Section 16 of the Radio Act of 1927, as amended in 1930.

Chairman Sykes made the following statement with reference to his proposed amendment:

> "Now, that follows practically, without reading, the present appeal law with reference to applications before the Commission. It takes away this though. It takes away the right of an applicant for a new station to appeal. And I will read the reasons why we have made that recommendation. Where the Commission enters any order affecting the renewal of a radio station license or the revocation thereof the right to existence of a radio station is involved. No other order that could be entered under the jurisdiction conferred upon the Commission by the proposed Communications Act would affect the very right to existence of any carrier or other company. The proposal would reenact with some limitations § 16 of the Radio Act of 1927. Under this section the Commission has experienced good results. A consistent body of radio jurisprudence has grown up. A single court has become well informed concerning a technical subject. It would seem desirable to continue to afford a direct method of appeal in the two instances provided for and such continuance would not give rise to any claims of jurisdiction by other persons or carriers subject to the jurisdiction of the proposed Communications Commission." Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess. 43 (1934).

Henry A. Bellows, Chairman of the Legislative Committee of the National Association of Broadcasters, also testified before the Senate Committee with reference to Section 402. He pointed out that the Interstate Commerce Commission was not in the main concerned with applications for certificates of public convenience authorizing the establishment of new transportation lines. He also pointed out that the Supreme Court had held that there can be no review of denials of such applications (negative order doctrine) and that the implied intent of Congress was to make ICC decisions final. He said that dealing with such applications was a large part of the work of the Federal Radio Commission. If the ICC rule as to negative orders applied, there would be no review of a large portion of the new Commission's orders. In order to preserve the right to review, the NAB considered that Section 16 of the 1927 Radio Act, as amended, should be substantially re-enacted. He stated that there was enough difference between the work of the radio division and the other divisions of the new Commission to justify a separate method of review for this class of cases in that division.[12]

The House of Representatives held hearings on H.R. 8301 in April, 1934. This bill would have continued appeals from decisions affecting communications by wireless as provided by Section 16 of the 1927 Radio Act, as amended, and appeal from decisions affecting communications by wire as provided by the Urgent Deficiencies Act of 1913. With reference to the concentration of litigation in radio cases in the Court of Appeals for the District of Columbia, which was provided for in the bill, Mr. Bellows made the following statement:

> "The present system appears to be working out exceedingly well, and it is the feeling of most of the people who have considered it—I think it is the feeling of the Radio Commission itself—that a much more orderly development in Radio Commission cases, which is highly specialized, is provided by hearing those appeals centralized in one court." Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 107 (1934).

Mr. Bellows described the appeal provision of S.2910, as amended to reflect Chairman Sykes' views and his own views, as follows:

> "Where the Commission itself initiates the action, the appeal may be taken to any three-judge district court. Where the action is initiated by the individual station, the appeal must be taken only in the Court of Appeals for the District of Columbia." Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 108 (1934).

S. 3285, which grew out of the hearings described above, was reported from the Senate Committee on Interstate Commerce on April 17, 1934. The following statement concerning Section 402 was made in the report by Senator Dill:

> "Section 402 provides for court review of decisions of the Commission. Under the ICC Act, all appeals from decisions regarding wire communications can be taken to the district courts under the

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[12] Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 68-69 (1934).

three-judge court law of October 22, 1913, but appeals from decisions under the radio law can only be taken to the courts of the District of Columbia as provided in the Radio Act.

"This system of appeals in radio cases is extremely burdensome to owners of radio stations who live long distances from the District of Columbia. Any station owner finding it necessary to appeal from a decision of the Radio Commission must come to Washington, however great the expense for both himself and his attorney, to file and prosecute his appeal. The expenses incident to repeated trips, added to the regular legal expenses for such appeals, should not be necessary.

"Under § 402(a), the court review now applicable to orders of the ICC will apply to suits to enforce, enjoin, set aside, annul or suspend orders of the Communications Commission, with certain exceptions, so that the special three-judge courts can review them and the applicant can then take his appeal direct to the Supreme Court of the United States.

"Under a number of decisions of the Supreme Court, suits to enjoin or set aside orders of the ICC as to findings of fact can be disturbed by judicial decre only in cases where the Commission's action has been arbitrary or has transcended the legitimate bounds of the Commission's authority. (See Seaboard Air Line Ry. Co. v. U.S., 254 U.S. 57, and ICC v. Louisville & Nashville R. Co., 227 U.S. 88).

"By enacting this provision into this bill, the Communications Commission can rely on well-established principles of law already interpreted by the Supreme Court. This method of appeal will apply in the great majority of cases under this Act.

"Subsection (a) excludes certain orders of the Commission with respect to radio-station licenses from this method of appeal. It provides that orders relating to the granting or refusal of an application for a new radio-station license or for the renewal or modification of a license shall be appealed only to the Court of Appeals for the District of Columbia. The bill then sets out the method of appeal by following § 16 of the Radio Act of 1927, providing for appeals of radio cases in the courts of the District of Columbia.

"Stated briefly, the court appeal provisions of this bill transfer the provisions of the present law with respect to injunctive relief and appeal as now found in the ICC Act and the Radio Act to this act, with the exception of the three kinds of radio cases referred to above.

"Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may

> file his appeal in the three-judge district court in the jurisdiction where he lives. In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D.C. to prosecute his appeal, just as he came to Washington to ask for the order.
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> "In fact, appeals from refusals of applications by the Commissions could not be prosecuted in the Federal district courts anyhow, and must be prosecuted in the courts of the District of Columbia.
>
> "Your committee believes that this appeal section is eminently fair. In nearly all cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. When an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia." S. Rep. No. 830, 73d Cong., 2d Sess. 9-10 (1934).

In the Senate debate on S. 3285, Senator Dill made the following statement with reference to Section 402:

> "Section 402, concerning which I started to speak, is what is known as the appeals section relating to the courts. There was considerable difference of opinion in the committee, and especially in the subcommittee, regarding this appeals section. We were confronted with a difficult problem. The Interstate Commerce Act provides for appeals from its orders and appeals from its actions in what are known as the 'three-judge' district courts of the country. The Radio Act provides for all appeals under that act in the courts of the District of Columbia.
>
> "If we shall have one commission handling the entire wire and wireless system, it would seem rather incongruous to have two systems of appeal. In any case it would hardly be proper that the appeals from the decisions of the Commission relating to the common carriers engaged in wire communications should go to one set of courts and those relating to common carriers engaged in wireless communications should go to another set of courts. So we wrote this provision providing that certain of the decisions of the Commission should be appealed in the three-judge district courts and that certain exceptions should be made relating to decisions of the Commission affecting radio. It provides that the three-judge court appeal provision may apply to orders of the Commission 'applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this act (except any order of the Commission granting or refusing an application

> for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license.'
>
> * * *
>
> "I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court. A station owner who lives in the Rocky Mountain area, or who lives in the far West, and who is compelled to come to the District of Columbia to prosecute his appeal, finds himself faced with an expense of from $400 to $500 for the mere trip of coming here, an equal amount for his attorney, if he brings one, and then the attorney fees in addition. I say of personal knowledge that some of the station owners have found it almost impossible to finance appeals in that way. So we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the Commission and asks for a change in his license or asks for a new license, or asks for something to be done by the Commission, then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia.
>
> "In other words, if the station owner has money enough to come here in the beginning to prosecute his case before the Commission, it is fair to assume that he has money enough to continue the appeal here. Not only that, but the refusal of the Commission to grant an application is a decision from which no appeal can be taken in the Federal district courts. It must be taken in the courts of the District of Columbia. So we have worked out this amendment, which is not satisfactory to all members of the committee, but which I think is fair, and which I believe will be found to be practicable and to work in a satisfactory manner." 107 Cong. Rec. 8825-26 (1934).

S. 3285 was reported to the House from the Committee on Interstate and Foreign Commerce on June 1, 1934. The Committee substituted its own proposal for S. 3285. The appeal provision in this proposal was the same as that contained in the original House bill, H.R. 8301. The House debated this provision on June 2, 1934.

On June 4, 1934, S. 3285 was reported to the House from the Conference Committee. The report had this to say on the appeal provision:

> "The Senate bill (Section 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission and, in the main, for radio cases carries forward the existing method of review of orders of the Federal Radio Commission; but in radio cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the ICC. The House provision contains a similar provision as to cases involving carriers, but leaves the present section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision." H.R. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934).

4. 1937 amendment of Section 402 of the Communications Act of 1934

In 1937, Section 402(b) of the Communications Act was amended to insert the phrases concerning radio operator's licenses which appear in it today.[13] There was no legislative history made on the appeal provision as a whole during the passage of this amendment.

5. 1949 amendment of Section 402 of the Communications Act of 1934, as amended

In 1949, Section 402(a) of the Communications Act was amended to substitute "Title 28 of the United States Code" in lieu of "the Act of October 22, 1913 (38 Stat. 219)." It read as follows:

> "The provisions of Title 28 of the United States Code, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting

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[13] Act of May 20, 1937, c. 229, §§ 11-13, 50 Stat. 197.

> or refusing an application for a construction permit for a radio station or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are authorized to be brought as provided in such Title 28." Act of May 24, 1949, c. 139, § 132, 63 Stat. 108.

This amendment merely reflected the codification of Title 28 made in 1948.[14] No real change in the method of appeal under Section 402(a) was made by the revised Title 28.

6. 1950 amendment of Section 402 of the Communications Act of 1934, as amended

In 1950, Section 402(a) of the Communications Act was amended by the enactment of Public Law 901.[15] Appeals under Section 402(a) had, as we have seen, been taken under the Expediting Act of 1913 to a three-judge district court for a trial *de novo,* with a right of appeal from that court direct to the Supreme Court. Public Law 901 provided for review of appeals taken under Section 402(a) by the court of appeals of the judicial circuit in which any of the petitioners for review resided or had its principal place of business, or by the United States Court of Appeals for the District of Columbia. Review was to be upon the record made before the agency, with further review by the Supreme Court on writ of certiorari. No other change was made in Section 402(a).

Both the Senate and House Reports from the Committee of the Judiciary[16] pointed out that H.R. 5487, the bill finally enacted, was the result of proposals made by the Judicial Conference and extensive hearings and study on these proposals by all parties concerned. The reports stated that the amendment had three advantages over the existing procedure. First, it would save the time and energy of the district and circuit judges. Second, it would avoid the making of two records, one before the Commission and the other before the district court. Third, it would prevent the Supreme Court from having to review all Section 402(a) orders, regardless of the importance of the points involved.

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[14] See 28 U.S.C. §§ 2321-2325, 2284, 1336 and 1253.

[15] Act of December 29, 1950, c. 1189, §§ 1-14, 64 Stat. 1129.

[16] S. Rep. No. 2618, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950).

With reference to appeals under Section 402(b), the House Report said:

> "This existing procedure is said to be satisfactory to the litigants and to the Communications Commission and to the Department of Justice, and since it does not involve the cumbersome review by three-judge district courts with direct appeal to the Supreme Court, which it is the purpose of the bill to cure, it is not germane to the present legislation." H.R. Rep. No. 2122, p. 2, 81st Cong. 2d Sess. (1950).

7. 1952 amendment of Section 402 of the Communications Act of 1934, as amended

In 1952, Section 402 of the Communications Act was amended yet once more. Of most significance to the present discussion was the broadening and clarification of Section 402(b). Section 402(a) was amended but the changes merely reflected more clearly the 1950 enactment of Public Law 901. It should also be noted, however, that the procedural provisions of Section 402 were amended to make applicable to practice before the Federal Communications Commission the procedural reforms of the Administrative Procedure Act of 1946.

The revised Sections 402(a) and 402(b) now read as follows:

> "(a) Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.
>
> (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> (2) By any applicant for the renewal of modification of any such instrument of authorization whose application is denied by the Commission.
>
> (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
>
> (4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the

Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interest is adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission." Act of July 16, 1952, c. 879, § 14, 66 Stat. 1093, 47 U.S.C. § 402 (Supp. 1960).

The original bill, H.R. 5497, contained an appeal provision which was drafted and approved by the Federal Communications Bar Association in December, 1941. It read as follows:

"(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), as amended, relating to the enforcing or setting aside of orders of the Interstate Commerce Commission are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under the provisions of paragraph (b) hereof), and such suits are hereby authorized to be brought as provided in that Act. In addition to the venues specified in that Act, suits to enjoin, set aside, annul, or suspend, but not to enforce any such order of the Commission may also be brought in the District Court for the District of Columbia.

(b) Appeals may be taken from decisions and orders of the Commission to the circuit court of appeals of the United States within any circuit wherein the appellant resides or has his principal place of business, or to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By an applicant for any instrument of authorization required by this Act, or the regulations of the Commission enacted pursuant to this Act, for the construction or operation of apparatus for the transmission of energy, or communications, or signals by radio whose application is denied by the Commission.

(2) By any party to an application for authority to assign any such instrument of authorization or to transfer

> control of any corporation holding such instrument of authorization whose application is denied by the Commission.
>
> (3) By any applicant for the permit required by section 325 of this Act or any permittee under said section whose permit has been modified, revoked, or suspended by the Commission.
>
> (4) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in subparagraphs (1), (2), and (3) hereof.
>
> (5) By the holder of any instrument of authorization required by this Act, or the regulations of the Commission enacted pursuant to this Act, for the construction or operation of aparatus for the transmission of energy, or communications, or signals by radio, which instrument has been modified, revoked, or suspended by the Commission.
>
> (6) By any radio operator whose license has been revoked or suspended by the Commission."

Mr. Bingham, the Chairman of the FCBA subcommittee that drafted this section, testified before the House Committee on Interstate and Foreign Commerce on April 14, 1942. He stated that difficulty had arisen in the application of Section 402 to specific cases. For example, the Supreme Court had held in *FCC* v. *Columbia Broadcasting System, Inc.,* 311 U.S. 132 (1940), that only orders specifically referred to in Section 402(b) could be taken to the United States Court of Appeals for the District of Columbia and implied that in other radio licensing cases, review must be obtained under Section 402(a). This, he stated, was decided

> "notwithstanding much in the legislative history of Section 402 which indicated that Congress intended to permit appeals to the United States Court of Appeals for the District of Columbia in all licensing cases initiated by individual applicants." Hearings on H.R. 5497 before the committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess. 61 (1942).

As a result of this decision, in many cases there was no way of determining, short of actual adjudication, which was the appropriate tribunal for review. Mr. Bingham said that the FCBA subcommittee's aim in drafting the section was to clarify this situation by providing that *all* cases resulting from the Commission's radio-licensing function would be appealable under Section 402(b).[17]

The FCC criticized the provision for a choice of venue in appeals under Section 402(b). It contended, first, that such a choice would tend to create uncertainty in the law arising from conflicting decisions, and, second, that it would place an undue and unnecessary administrative burden upon the Commission.

S. 814, the original Senate Bill, reflected the Commission's views and limited appeal under Section 402(b) to the Court of Appeals for the District of Columbia. It did, however, provide that review under Section 402(b) should include the same classes of cases as H.R. 5497.

Mr. James L. Fly, Chairman of the Federal Communications Commission, testified with reference to S. 814 before the Senate Committee on Interstate Commerce on December 16, 1943. He stated that the Commission objected to the choice of review provided for in Section 402(a) as there was "no valid reason for this option." [18]

S. 1333 grew out of H.H. 5497 and S. 814. Its appeal provision was substantially the same as that in S. 814. It did, however, specifically include in Section 402(b) appeals from cease and desist orders and from declaratory judgments.

Mr. Charles R. Denny, Chairman of the Federal Communications Commission, testified on S. 1333 before a subcommittee of the Senate Committee on Interestate and Foreign Commerce on June 17, 1947. He pointed out that the Conference of Senior Circuit Justices had recommended that the dual method of reviewing Commission orders be abolished and that a bill for that purpose had been introduced in the House. He said:

> "that the Commission would like to recommend that in addition to the material already contained in the earlier hearings the committee should consider the advisability of abolishing the dual methods of appeals which is now contained in Section 402 of the Communications Act. The Commission agrees with the findings of the Senior Circuit Justices that the procedure prescribed by the Urgent Deficiencies Act is inconvenient both for the litigants and for the courts.
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> "If the committee agrees with this suggestion, it is recommended that section 402(a) and (b) be deleted and subsequent sections be

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[17] *Id.* at 62.

[18] Hearings on S. 814 before the Committee on Interstate Commerce, 78th Cong., 1st Sess. 945 (1943).

> renumbered and that a new section 402(a) be adopted reading as follows:
>
> 'An appeal may be taken, in the manner hereinafter provided, to enjoin, set aside, annul or suspend any order of the Commission under this Act. Such appeal may be filed either in the circuit court of appeals for the circuit wherein the appellant resides or in the United States Court of Appeals for the District of Columbia.' " Hearings on S. 1333 before a Subcommittee of the Committee on Interstate and Foreign Commerce, 80th Cong. 1st Sess. 68 (1947).

Mr. Guilford S. Jameson, Acting President of the FCBA, also testified during these hearings. He supported the extension of review under Section 402(b) because of the inconvenience of the three-judge district court procedure, the coherent body of communications law built up by the Court of Appeals for the District of Columbia, and the clarification in the types of appeals that might be taken under Section 402(b).[19]

S. 1333 was reported from the Committee on Interstate and Foreign Commerce on June 9, 1948. The report stated that the proposed Section 402(b) was drafted to avoid the jurisdictional problems that had existed under the old section. It said:

> "that the language of this subsection when considered in relation to that of subsection (a) would make it clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to that court." S. Rep. No. 1567, 80th Cong., 2d Sess. 19 (1948).

This same language was used in the Committee's report on S. 1973 [20] and in its report on H.R. 4251.[21]

S. 658, the bill finally enacted, contained an appeal provision which was substantially the same as that found in S. 1333. Hon. Harold M. Stephens, Chief Judge, United States Court of Appeals for the District of Columbia Circuit, testified with reference to this provision on behalf of the Judicial Conference of the United States before the Committee on Interstate and Foreign Commerce on April 30, 1951. He pointed out that on December 29, 1950, the Congress had passed Public Law 901 which abolished review of Commission orders under Section 402(a) by the three-judge district court, with a right of appeal direct to the Supreme Court, and substituted for it review either by the Court of Appeals for the District of Columbia or by such other courts of appeals in which venue was proper, with further review in the Supreme Court on a writ of certiorari. He stated that the proposed Section 402(a) would have the effect of repealing Public Law 901, insofar as Public Law 901 applied to Section 402(a) orders. He recommended that the provision be changed to reflect the Act of 1950.[22] It should be noted that Judge Stephens said with reference to Section 402(b) orders that, since 1929, exclusive appellate jurisdiction over radio license orders had been in the Court of Appeals for the District of Columbia, and thereafter to the Supreme Court on a writ of certiorari.[23] He added:

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[19] Hearings on S. 1333 before the Subcommittee of the Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 86 (1947).

[20] S. Rep. No. 741, 81st Cong., 1st Sess. 15 (1949).

[21] S. Rep. No. 741, 81st Cong., 2d Sess. 13 (1950).

> "I might say, I think that is a mistake. I think it is more or less an historical action. I think it would be better to have a concrete [sic] jurisdiction in all the circuit courts of appeals over radio licensing orders." Hearings on S. 658 before the Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 402 (1951).

S. 658 was reported to the Senate from the Committee on Interstate and Foreign Commerce on January 25, 1951.[24] The bill was not amended to reflect Judge Stephen's recommendation. The report described the purpose of Section 402 in the same words used in the reports on S. 1333, S. 1973 and H.R. 4251.[25] S. 658 was passed by the Senate on February 5, 1951.

S. 658 was reported to the House from the Committee on Interstate and Foreign Commerce on April 8, 1952. The Committee amended Section 402(a) to reflect Judge Stephen's recommendations on behalf of the Judicial Conference.[26] The bill as amended was passed by the House on June 17, 1952. The Senate disagreed with the House amendments and asked for a conference on June 18, 1952. On July 1, 1952, the Conference Report was issued. The section, as reported by the Conference Committee, was essentially the House bill, incorporating Judge Stephen's recommendations.

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[22] Hearings on S. 658 before the Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 384-88 (1951).

[23] *Id.* at 388-89, 402.

[24] S. Rep. No. 44, 82d Cong., 1st Sess. 11 (1951).

[25] See pp. 24-25.

[26] H.R. Rep. No. 1750, 82d Cong., 2d Sess. 17-18 (1952).

Both the House and the Senate debated and agreed to the Conference Report on July 2, 1952.

SUMMARY

From the legislative history discussed above, it can be seen that the dual method of appeal in radio cases originated in 1927, was reintroduced in 1934, and continued in 1952. On each occasion, an unquestioned assumption was made as to the desirable general statutory scheme for appeals and an exception was made for certain classes of appeals in radio cases.

Thus, in 1927, it was assumed that, generally, appeals in radio cases should be taken to the Court of Appeals for the District of Columbia. At the time, this assumption was not questioned. An exception to the general rule was made, however, for cases in which the Commission itself initiated the action from which the appeal was being taken. It was urged that in such cases an unfair burden would be placed on the appellant if he were compelled to go to Washington to prosecute his appeal.

In 1930, radio appeals were, for the first and last time, concentrated in one court. Little indication is given in the legislative history as to the reasons for this amendment, but it would seem that all other considerations had given way to the compelling need to assure that some sort of judicial review would be available for radio cases.

In 1934, the assumption was made, and again not questioned, that generally appeals from orders of the Commission should be taken under the three-judge court procedure of the Expediting Act of 1913 which had hitherto applied only to appeals from orders concerning communications by wire. An exception to this general rule was again urged for certain classes of radio appeals. The "burden" argument was again used to justify a dual appeal provision. It was also argued that some concentration of appeals in the Court of Appeals for the District of Columbia was necessary to ensure review of negative orders in radio cases. In addition, arguments were made that it is advantageous to have radio appeals centered in one court. The development since 1930 of an orderly and consistent body of radio jurisprudence by the Court of Appeals for the District of Columbia was pointed to as a desirable result of the concentration of appeals in that court. Hence the exception was made.

The 1952 amendments of the dual appeal provisions were principally concerned with the clarification of the boundaries between the two appeal sections. Hence, all "radio-licensing" cases were included under Section 402(b). In support of this, the arguments in favor of review by one court of such cases were again made. In addition, it was stated that the litigation of radio appeals all over the country would place an impossible administrative burden upon the Commission. Mr. Charles R. Denny, Chairman of the Federal Communications Commission, was the only person who suggested that the dual method of review be abolished.[27]

Conclusions

It seems that there are three realistically possible approaches for review of actions of the Commission. They are as follows:

a. The present approach under which the Court of Appeals for the District of Columbia has exclusive jurisdiction to review certain actions of the Commission and has concurrent jurisdiction, along with other courts of appeals, to review other actions of the Commission (dual appeal).

b. An approach under which the Court of Appeals for the District of Columbia would retain jurisdiction, and jurisdiction would be given to other courts of appeals, to review *all* reviewable actions of the Commission (concurrent appeal).

c. An approach under which the Court of Appeals for the District of Columbia would have exclusive jurisdiction to review *all* reviewable actions of the Commission (exclusive appeal).

It should be noted that under all of the above approaches the Court of Appeals for the District of Columbia would retain at least concurrent jurisdiction to review any reviewable action of the Commission. It is, of course, possible to adopt an approach under which all or some reviewable actions may be reviewed only in the judicial circuit in which appellant resides, does business, has its principal office, etc. Since during the course of our review of the legislative history of the Communications Act and our consideration of this matter no strong reason was evident for not retaining at least the concurrent jurisdiction of the Court of Appeals for the District of Columbia, this approach is not listed above. This should not, of course, preclude consideration of this approach.

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[27] See pp. 23-24.

In considering the approaches listed above, the following, not necessarily in the order of their importance, are factors which have been distilled from the legislative history or otherwise seem relevant to a consideration of which of the above approaches should be recommended:

1. The desirability of being able to determine, prior to adjudication, in which court or courts an action for review of a specific Commission order may be instituted. It seems that under the present dual appeal approach attorneys sometimes are not able to make the above determination. This factor seems to look most strongly toward adoption of the exclusive jurisdiction approach, under which consideration of both the specific action review of which is sought and whether venue is proper would not be necessary, and less strongly toward adoption of the concurrent jurisdiction approach, under which proper venue would still have to be considered, or toward a refinement of the present dual appeal provision.

2. The desirability of minimizing the financial burden on private parties when an appeal is taken. In this connection it seems relevant to consider whether there is or would be an increased burden if some or all orders were made reviewable exclusively in the Court of Appeals for the District of Columbia. If there is or would be such an increased burden, this factor would look toward the concurrent jurisdiction approach.

3. The desirability of minimizing the administrative burden on the Commission when appeals are litigated. This factor looks toward adoption of the exclusive jurisdiction approach.

4. If the negative order doctrine, under which courts set up by Congress under Article III of the Constitution may not constitutionally review Commission orders denying applications for communications facilities, has some present validity, this doctrine would bar the recommendation of exclusive jurisdiction. It is believed, however, that this doctrine has been repudiated and need not be considered further.

5. In order to facilitate the development of an orderly and consistent body of communications law, it seems that the exclusive jurisdiction approach would be most fruitful. On the other hand, it should be carefully considered whether a practice which permits divergent and inconsistent decisions by different courts of appeals, with an ultimate resolution of the conflict by the Supreme Court, is a virtue or defect of our judicial system. To the extent that

the uncertainty that results is the necessary price that must be paid for the increased chance of obtaining a "correct" decision, the concurrent jurisdiction approach may be beneficial.

6. If it is desirable to have often technical and complex issues of communications law determined by judges knowledgeable in this field, this would look toward the exclusive jurisdiction approach. On the other hand, it seems that one reason for judicial review of agency action is the desirability of not letting an expert body have the final word on matters within its expertise, but rather letting non-experts make the final determination. It should be further considered whether this latter point is not ameliorated to some extent even under an exclusive jurisdiction approach, for discretionary review by the Supreme Court would still be available.

7. If either the concurrent or exclusive jurisdiction approaches are recommended, the problem presented by the different procedures presently operative under the dual appeal system would, of course, be eliminated. If the dual appeal approach is recommended, it is believed that the procedures under both classes of appeals should be made as similar as possible. No reason is apparent for having such differences in procedure in view of the confusion they engender.

As will be apparent from a review of the above-listed factors, they have been confined to those which were felt to be basic and which should be considered in recommending a general approach to the problem of judicial review of the Commission's orders. In view of the basic nature of this problem, it seems that a thoughtful appraisal of this matter is called for and should be undertaken. Once a general approach is decided upon, matters of detail may then be considered.

THE NLRB AND TECHNIQUES FOR EXPEDITING THE ADMINISTRATIVE PROCESS

By Frank W. McCulloch

Chairman, National Labor Relations Board

Congressman Sidney Yates of Chicago tells about the farmer who after a long, laborious drive along a dusty road inquired of a man on a porch:

"Say, stranger, how much longer does this durn hill last?"

The stranger, according to Yates, smiled and replied, "You're not on a hill, friend. Your hind wheels are off."

I am sure that many who try to get a case processed by the National Labor Relations Board feel that our hind wheels are off. And some who represent respondents may be glad that they are. Rest assured, however, that we on the Labor Board are equally concerned about the state of our hind wheels; about our seeming inability to keep abreast of our lengthening calendar of cases.

I. The Need for Prompt Administrative Remedy

We are especially concerned about giving prompt and effective relief because of the perishable nature of our clients' problems. Despite the various amendments to the Act in the past dozen or so years, discrimination against employees for their union activities or their refusal to participate in such activities still remains the Board's biggest business. In fiscal 1961, for example, 78 percent of the unfair labor practice charges against employers—more than three out of every four—involved allegations of illegal discharge. And 54 percent of the cases against unions—more than half—involved alleged illegal discrimination.

These people are discharged, or deprived of employment opportunities, and from their point of view unless the Board acts quickly, it might as well not act at all. Justice delayed for the unemployed worker is justice denied, for unless he is put back on the job within a short time, he must seek employment opportunities elsewhere, and his case becomes largely academic. Moreover, the unremedied discrimination often discourages other employees so that they cease or do not dare to start exercising their lawful rights under the law.

The second most common type of charge we at the Board receive is one of refusing to bargain in good faith. This constituted, in 1960, 23 percent of the cases against employers and 8 percent of the cases against unions.

Here again a speedy remedy is necessary. Today's refusal to bargain is not often remedied by a Labor Board order a year hence, or an enforcing Court order 2 years hence, for by that time the problem, for better or worse, is usually resolved. The union resorts to strike action and gets its desired contracts, or, alternatively, the union is too weak to strike and fades from the scene as its members lose confidence in its ability to improve conditions of employment. In either event, economic strength is substituted for orderly administrative process, and the nation's labor policy—to encourage the practices and procedures of collective bargaining—is thwarted.

While I cannot speak with authority on the subject, I am sure that other agencies must also act quickly if their processes are to be effective. A Federal Trade Commission cease and desist order, for example, must be issued promptly or an unfair trade practice may drive a business rival from the field. A Securities and Exchange Commission permit, if too long delayed, may come after the business opportunity has passed. Delay in the processing of a Federal Communications Commission television application may deprive a total community of the benefits of enlightened technology. The Labor Board is certainly not the only agency where prompt action is essential.

II. PROMPT ADMINISTRATIVE RELIEF IS NOT ALWAYS AVAILABLE AT THE LABOR BOARD

The serious delays in proceedings before the Labor Board are too well known to require documentation here. Before the House investigating committee headed by Congressman Pucinski, before the Government Operations and Appropriations Committees of both House and Senate and in the report of the Cox Panel, the delay skeletons in our closet have been thoroughly exposed, if not vigorously rattled.

The Cox report concludes, "These shocking delays seriously affect the usefulness of the National Labor Relations Act." And we in the Board have said equally tough things about the situation.

Great improvement has been made in connection with our representation cases, as I shall show in a moment. But the 400 days required, on the average, to process unfair labor practice cases is far too long. And the fact that over 40 per cent of this time is taken at the Board level—from the Trial Examiner's report to the Board decision—pinpoints the special need of new techniques to expedite the Board's casehandling.

III. TECHNIQUES FOR EXPEDITING CASE HANDLING

A. *Delegation*

The principal proposal favored by all the present Board members and by the past three Chairmen to meet the delay problem at the Board level, is to limit the scope of review afforded trial examiner decisions, affording full review only in those cases which because of clear errors of fact or law or procedure, or because of important legal or policy considerations, at least 2 of the 5 Board Members deem deserving of such attention.

This proposal has been endorsed recently by outside experts who have studied our procedural problems; among others, the Cox Panel in 1960 and the independent management firm of McKinsey & Co., retained by the Bureau of the Budget in 1959.

Reorganization Plan 5 which would have permitted such delegation was defeated. The Carroll Bill, S. 1734, to reach the same result has not come out of Committee, and its prospects are not bright. But pursuant to the repeated suggestions of Members of Congress and practitioners that the Board explore more fully its authority under present law to cull out the wheat from the chaff, we are doing just that.

This proposal, if adopted, would save much time in the processing of our unfair labor practice cases. We need only to look at our experience in the delegation of greater finality in representation (election) case decisions.

In the 1959 Landrum-Griffin amendments to the Labor Management Relations Act of 1947, Congress authorized the Board to delegate to our Regional Directors the decisional power we have over representation cases; to determine the unit appropriate for the purpose of collective bargaining, to investigate and determine whether a question of representation exists and whether an existing contract is a bar, to direct an election, to hear and decide objections and challenges and to certify results. This delegation went into effect on May 15, 1961. The decisions of the Regional Directors in this area are now final, subject to a certiorari-type of review by the Board.

Prior to the delegation, it took an average of about 90 days from the time a petition for election was filed to the time when an election was ordered. Since the delegation, there have been 332 petitions for an election, and the Regional Directors ordered elections or otherwise terminated the cases in an average time of 43 days—a saving of 47 days. In these 332 proceedings since our delegation, there were 49 requests for Board review, of which 6 were granted.

Although the procedures for handling these cases are quite different from the unfair labor practice case procedures, this beneficial experience of the Labor Board in representation cases reffects that of the other agencies which have adopted regulations giving greater finality to the decision of the hearing examiner. The Atomic Energy Commission exercises a "discretionary" review of hearing examiner decisions in its licensing proceedings, as do the following agencies:

a. The Civil Aeronautics Board in issuing airworthiness certificates;

b. The Federal Trade Commission in its unfair trade practice cases;

c. The Department of Health, Education and Welfare in its old age and survivors cases;

d. The Department of Labor in its Walsh-Healey cases, and

e. The Treasury Department in its federal alcohol license proceedings.

The number and percentage of cases decided within six months or one year is considerably higher in these six agencies which exercise a limited review than it is in the agencies, such as the Labor Board, which grant full, *de novo* review upon request. And I believe the difference is in substantial part due to the difference in procedure.

The case for delegation to the extent that the law permits is therefore compelling.

B. *Pre-Hearing Procedures to Narrow the Issues*

As in many civil suits in the courts, stalling and foot-dragging by the parties, to delay a defeat or obtain a more favorable settlement are not unknown in Labor Board proceedings.

During the recent hearings before the Pucinski Committee, a labor union spokesman gave this testimony about delays in two representation cases:

> "One company delayed an election while the Board considered its claim that the pilot of a private plane belonging to a company executive should be part of a unit of production workers we sought to represent.
>
> "In another case, an election was stalled while an employer attorney argued at length that a watchman at a company-owned recreation area 65 miles away from the plant should be part of the production unit we petitioned for."

These cases may be extreme, but there is no doubt but that many frivolous issues are raised solely to "gain time." The pressing need to curtail dilatory tactics without denying due process, therefore, is leading the Board to renewed consideration of prehearing procedures.

The Board is watching its representation case delegation closely to see if all avoidable delays are squeezed out. If not, we shall have to study further whether under the statute's requirement of "an appropriate hearing," the Board has more leeway to streamline its election procedures. And in unfair labor practice cases, more use of pre-trial conferences is being considered to narrow the real issues for hearing and later Board review.

C. *Cut Down on the "In-Take"*

One reason, and a major reason, for our delay lies in our tremendous and steadily growing caseload. The cases snowball, and it takes a long time to reach those at the bottom of the pile. From an average of about13,000 filings in the first ten years of Taft-Hartley, the number has jumped in the last four years to almost 23,000 a year.

In 1959, for instance, a total of 21,586 cases were filed in the regional offices of the Labor Board, 12,239 unfair labor practice cases, and 9,347 representation or election cases. This number of cases—21,586—gains perspective by comparison with the federal court docket. In 1959, in the 86 federal court districts, there were 57,800 new civil suits of all kinds; 14,872 cases filed by or against the United States; 17,340 private suits based on diversity of citizenship; and 6,065 civil suits of every variety in the District Court for the District of Columbia.

Of course, fortunately, not all the cases filed in the regional offices reach the Labor Board members for decision. However, the number that does is large. In 1959, the Labor Board members issued a total of 2,883 decisions in all types of cases; 764 in unfair labor practice cases alone. By way of contrast, in the same year the Court of Appeals for the District of Columbia Circuit handed down 507 decisions; the First Circuit, 119; the 10th Circuit, 247; the Court of Customs and Patent Appeals, 35.

It is readily apparent that the Labor Board members have their hands full. And the problem of caseload grows yearly more intense. The unfair labor practice cases reaching the Board in 1956 averaged 19 per month. This past year, the number more than doubled, 51 per month. The Board's production of decisions has also increased sharply. But the backlog of undecided complaint cases rose this year to an all-time high in consequence of our soaring intake.

One way to resolve our delay problem, of course, is to cut down on our caseload. There are two alternative techniques by which this may be achieved, the carrot and the stick. The carrot technique, pre-trial settlement and negotiation, is appropriate when the violator of the statute acts innocently, in good faith, or in ignorance. Our General Counsel has emphasized efforts by our Regional Directors to sit down with employers, unions and individuals and work out a settlement of cases where an investigation evidences merit to charges of unfair labor practices. In the last 4 years the number of unfair labor practice cases disposed of by voluntary agreement of the parties has more than doubled. In fiscal year 1958, there were 987 such cases—in fiscal year 1961, there were 2,569. This voluntary settlement is an important part of the picture of relieving the administrative and judicial processes of unnecessary litigation and giving them more time to do better the remaining part of the job.

Now the *stick* technique. Unfortunately, the carrot approach will not work with all those that violate our statute. Some employers, and some unions, repeatedly violate the terms of our statute with knowledge that they are doing so. The number of unfair labor practices, despite wide-spread publicity, grows rather than diminishes. One reason for this lies in the apparent ineffectiveness of our remedies in many cases. For example, when an employer discharges the leading union adherents in his plant at the outset of an organizing campaign, the customary Board remedy is at long last to order their reinstatement with back pay. This remedy, many union officials claim, is too little and too late, and it constitutes no more than a "license fee for union busting." The employer willingly pays such fees if it assures him of an operation free from unionism.

Obviously, we need a bigger stick in this kind of situation. Congressman James Roosevelt commented during the recent Pucinski Committee hearings that the remedy for repeated and willful violations of the statute is "to make the penalties for such unfair labor practices so doggone stiff that anybody who did it would think twice about it."

We at the Labor Board are now studying various ways of taking the profit out of unfair labor practices, whether committed by employers or unions. One suggested remedy for use when an employer destroys the majority status of a union by illegal techniques during an organization drive is to restore the prior situation as fully as possible and to saddle the employer with the union for a twelve-month period during which he must recognize and bargain with it. Should the employer refuse to bargain "in good faith," it has been suggested that the Board seek injunctive relief in the Courts (pursuant to 10(j) of our statute) and request that the employer be required to demonstrate good faith by embodying existing conditions in a written document and, additionally, to make reasonable counter-proposals to reasonable union demands.

The names of Norris and LaGuardia remind us that government by injunction in labor relations has long been abhorred by many. Yet before Congressional committees and in direct appeals to the Labor Board, urgent requests have recently been made for more extensive Board use of the discretionary injunction procedures of Sec. 10(j) of our statute. We are giving these proposals the most serious study, despite their unpopular past, to see if we can thereby better effectuate the purposes of the Act.

What will come of these and other suggestions remains to be seen; but the fact remains that more ingenious "remedies" must be considered if the administrative process is to be expedited. My comments on expediting the administrative process by utilizing the techniques of (1) delegation of greater authority to hearing examiners, (2) more liberal use of pre-hearing procedures to narrow the issues to be tried, (3) more utilization of "settlement" procedures, and (4) utilization of remedial orders commensurate to the occasion, have special relevance to the situation at the Labor Board.

As a postscript, let me add one other comment. Some groups which still oppose the objectives of the Labor Act, will equally oppose the elimination of long delays in its enforcement. Respondents are not always keenly interested in swift justice. But under the oath we have taken and the law we administer, the Members and the General Counsel of the Labor Board have a clear duty to Congress which established us, to the President who appointed us and to the parties and the public who have basic rights under the statute, to make every appropriate effort to speed up and improve the Board's procedures.

We hope you will help us to get our hind wheels firmly in place—and rolling!

THE FTC AND PROCEDURAL REFORM

By Philip Elman

Commissioner, Federal Trade Commission

The Federal Trade Commission is one of the oldest of the administrative agencies. Established almost half a century ago, in 1914, its main job is to promote effective and fair competition by preventing restrictive and fraudulent trade practices. It seeks to preserve the benefits of a free economy by eliminating such abuses as price fixing and discrimination; false and misleading advertising; and other restraints of trade and attempted monopolization.

How well has the Commission done this important job? In its report in 1949, the Hoover Commission found that the Federal Trade Commission's record "is disappointing. * * * The Commission has been hampered by inadequate funds, hostile court rulings, mediocre appointments. * * * As the years have progressed, the Commission has become immersed in a multitude of petty problems; it has not probed into new areas of anticompetitive practices; it has become increasingly bogged down with cumbersome procedures and inordinate delays in disposition of cases."

Despite some progress made in recent years, this appraisal of the Federal Trade Commission has much validity today.

The evils which the Commission was created to remedy are still very much with us. There is a growing concentration of economic power, particularly in the basic industries. A relatively few corporations control vast segments of our industrial economy. There is mounting concern over the moral and ethical standards reflected in some current business and advertising practices.

What is the Commission doing to improve its performance? First of all, the problem of administrative delays. There has developed at the Commission the practice of so-called "peripatetic hearings" and "hearings at intervals." A hearing will be held in various cities on the installment plan, moving along in spurts and jerks for years or even decades. In this Alice-in-Wonderland way of trying a case, it is not surprising that it took sixteen years to enter a final order deleting the word "liver" from the name of a brand of "little pills."

In the last few months, however, the Commission has taken two long forward steps to eliminate these inexcusable delays. First, it has reorganized its internal administrative structure to centralize staff responsibility. Secondly, the Commission has drastically revised its Rules of Practice. The hearing will not be a game of combat by surprise, but will be an inquiry for the ascertainment of the facts, fairly, expeditiously and economically. The examiner will be an active presiding officer, firmly guiding and controlling the proceedings. There will be mandatory prehearing procedures, to simplify the issues and expedite presentation of evidence. Appropriate discovery procedures will be used. The hearing examiner will see that a case is proved only once, not many times over. And, most important, the hearing will be held at one place and continue without suspension until finished, unless the Commission orders otherwise upon a certificate of necessity filed by the hearing examiner.

The Commission has also streamlined its procedures for negotiation of consent orders, and for taking appeals to the Commission from decisions of examiners. Under the new Rules petitions for review will be granted only when two or more Commissioners find, on examination of the record, that substantial questions are presented.

But these procedural reforms, constructive and important as they are, are no more than a partial solution. The entry of cease and desist orders issued after formal complaints represents the "judicial" side of the Commission's work. But there is another side which is certainly no less important. In its non-judicial role, the Commission should systematically survey our economy and search out unfair practices which, if allowed to grow, may become full-blown monopolies or restraints of trade. The business of a court is determined fortuitously, by the cases that happen to be filed by litigants. But the Commission cannot be so circumscribed. Its role as guardian of a free economy cannot be confined to the complaints that arrive in its mail.

The Commission will soon establish a full-time policy planning staff, which can take a long-range view and explore ways of dealing with emerging basic problems. Industry-wide reforms can cure in a few weeks competitive ills that would require many years of formal litigation to remove. Hit-or-miss adjudication on a case-by-case basis seldom will produce comprehensive solution of general trade practice problems.

But the key to the success of the Commission will not be found in any paper reforms. An agency is no better than its Commissioners and staff members. As the President has said: "No amount of reorganization or new procedures can be effective without, or substitute for, high quality personnel in charge of these agencies. No other single step can accomplish as much."

The broad responsibilities and policy judgments entrusted to an agency like the Federal Trade Commission cannot be left to narrow technicians, whether they be economists or lawyers. The primary qualities to be sought in administrators are impartiality, fair-mindedness, and dedication to the statutory objectives. It would be desirable to get better men and to keep them on the job longer. Perhaps in time such men would acquire the "expertise" about which we hear so much and find so little.

In his report to the President-elect, Dean Landis observed that "As long as selection of men for key administrative posts is based upon political regard rather than competency, little else that is done will really matter." To attract competent people to the public service, we must select and promote them on the basis of merit alone; we must offer them challenge and responsibility; we must treat the people's servants with the respect that their high calling deserves; and, as a bare minimum, we owe them a living wage.

IMPROVING THE ADMINISTRATIVE PROCESS: A VIEW FROM THE CAB

Alan S. Boyd

Chairman, Civil Aeronautics Board

In recent years, observers of our administrative agencies—supporters and detractors alike—have been almost unanimous in the view that the administrative process must be simplified and speeded up.

I am a supporter of the administrative agency concept. I believe that functioning in their proper spheres, run by competent men, and operating under sound laws containing wise Congressional guidelines, the agencies make invaluable contributions in the public welfare and national interest. Because I believe this, and also realize that the optimum contribution will be forthcoming only if the agencies operate efficiently—with fairness, wisdom, and dispatch—I stand with the forces that have been calling for improvements in the administrative process.

There is no easy answer to the question of what should be done. The matters that come before the agencies today are complex and controversial. The disposition that the agencies make of them vitally affects important interests and rights.

To be adequate, the process must be such as to get before the agency the information it needs to understand the complex issues it is dealing with, and upon which it can base proper decisions. It must be such as to guarantee persons whose interests and rights are at stake the opportunity to be heard, and the agency an opportunity to consider and carefully weigh the conflicting viewpoints. Speed and simplification become hollow things if their price is action that is unsound or unfair.

But speed and simplification must be attained. Even the most meticulous procedures cannot be justified if they become a luxury that only the person with financial resources to withstand long and expensive litigation can afford. Or, if the decisions they help produce—sound though they may be—come too late. Or, if they plunge the agency members into such a morass of procedures and proceedings that most of their time is spent simply in deciding individual matters, and little or no time is left to plan, and to formulate the basic policies that must be the foundation on which sound decisions are built.

I do not pretend to have a ready solution to all the problems. There is no single prescription that is a "specific" for every one of the ills. The solution lies in moving forward on all fronts—the substantive and procedural alike.

That is the approach we have taken at the Board. To illustrate, some months ago we established a Planning Office with the responsibility of reviewing, under present day conditions, the basic goals of our statute and of suggesting methods by which they can best be achieved. We have established a "Procedures Committee" comprised of top staff members and have charged it with reappraising all our procedures and coming forward with proposed changes that will speed up and simplify our processes. That project has highest priority. More recently, we formed a "Practitioners' Advisory Committee" comprised of lawyers familiar with administrative problems generally, and the problems of the Board in particular, in order that we might have the benefit of their thoughts and suggestions on improving our procedures.

These steps are not ends in themselves. Instead they constitute an important development. For they, and similar activities going on in other agencies and elsewhere, reflect the emergence of an attitude or frame of mind that must exist if progress is to be made. They indicate a realization that improvements have to be made, a desire to see them made, and a willingness to take steps to bring them about.

Time will not permit here a detailed exploration of many specific matters. I, therefore, will mention only a few items. These are not cited as cure-alls, or as necessarily the most important matters. They have been chosen because they all touch areas in which I, during my tenure as a member of an agency, have encountered problems, and because they seem to me to provide fertile ground for beneficial change.

If improvements in our administrative process are to come, it is essential, in my view, that the agency members delegate decision-making on some of the multitude of matters that come before them. My emphasis on this does not spring from a desire to save wear and tear on the agency members, although as a member myself, I must confess that any step that might do this would be warmly welcomed. It stems from the simple and inescapable fact that commissioners are mortal men, and that the day, no matter how fully and efficiently it may be used, is only twenty-four hours long. Anyone who has served as a member of one of our agencies knows the frustration of being faced day after day with an unending mass of complicated matters that must be disposed of, and of realizing that no matter how hard he tries there simply isn't enough time to give them the thought they deserve and require.

Delegation of authority, like other reforms in the administrative process, poses its own problems. The underlying and basic one is how to provide for delegation in a way that will relieve the agency members or commissioners of the almost impossible task of personally passing on every matter that may arise, and at the same time will permit members to retain the control, direction, and participation that must exist if they are to do their duty.

The typical regulatory statute covers a broad spectrum of rights and obligations. The agency charged with administration of the statute is the forum to which persons whose interests are affected must turn. They are entitled to do this, and any system of delegation must be such as to make adequate provision for their being able to do so.

On the other hand, the objectives of these statutes, thus the duties of the agencies, are not merely to handle the litigation of disputes between private parties or the adjudication of private rights. The statutes are forward looking, and contain promotional and developmental provisions directed to the achievement of important over-all goals in the interest of the public and the nation as a whole.

Whether one believes that agency policy should be formulated on a case by case basis within the framework of formal proceedings, by specific policy pronouncements outside of litigated cases, or by some blending of these two, I am sure we all agree that sound basic policy formulation is essential to the effective working of the administrative process. Unfortunately, this function, in my judgment, has for some time been somewhat neglected. To a significant extent that neglect has come about because agency members have not been able to devote the time to policy formulation that is merited and required.

It would be ideal if commissioners could successfully perform the policy-making function and still find time to give personal attention to every matter, however small, that comes before them. Experience has proved this is not possible. Hence the need for procedures that will make it possible for agency members to concentrate on essentials without losing sight or at least oversight of other matters. Authority to delegate will not provide the whole solution. It will, however, make available a tool that can help do so. It is a sharp tool, and must be used skillfully lest it slip and separate agency members from the responsibility that, in the final analysis, must be theirs alone. But despite its problems, I am convinced that delegation can be made to work.

Reorganization Plan No. 3 of 1961, which recently became effective, authorizes the Civil Aeronautics Board to delegate any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board. The plan leaves to the Board itself the determination of the matters that shall be delegated, the circumstances under which the Board will review action taken under delegation, and the specific procedures whereby a party may seek Board review.

Like certain other regulatory statutes, the Federal Aviation Act contemplates a bipartisan Board. To this end, it specifies that no more than three of the five Board members shall be appointed from the same political party. In order to insure that this bipartisan complexion is maintained, the Reorganization Plan specifically provides that notwithstanding any rules that may be set up governing review of delegated action, "a vote of a majority of the Board less one member thereof" will automatically require review by the Board itself.

At the present time, we have under active consideration the question of the specific actions that should be delegated, the standards that should be applied in determining whether the Board will review, and the type of procedural rules that will be needed. This calls for important decisions, and even after those decisions are made, considerable work will be required to prepare the necessary rules. Despite this, we hope to be able in the not-too-far-distant future to begin implementing the plan.

We intend to make effective use of the authority that has been given us. But we have no intention of going overboard simply to make a big initial splash. I, for one, want no part of a headlong dive from the high board until I know how deep the water is, and what kind of rocks may be hidden below the surface.

My second point concerns the possibility of cutting down on the number of dispositions by formal proceedings, and of imparting a greater sense of direction to those proceedings that are held.

The adversary, judicial-type proceeding, is the traditional American method of resolving disputes and controversies. It has been carried forward into our administrative system, and is a required procedure for disposing of many of the questions that come before administrative agencies.

Having been trained in the law, and being respectful of our legal traditions, I have faith in the process. However, in the administration of regulatory statutes directed principally to the promotion and protection of the over-all public interest, I am not convinced that institution of an administrative law suit is necessarily the logical starting point in every instance.

For example, under the Federal Aviation Act a carrier obtaining a certificate of public convenience and necessity authorizing air service receives certain rights and also assumes certain obligations. Among the obligations is that of providing adequate service as authorized by the certificate. If a community believes that a carrier is failing to meet its obligations it can file a complaint with the Board. If the complaint is not satisfied, and the Board finds reasonable grounds for investigation, it embarks on a formal hearing. If the record establishes the alleged inadequacy, the Board must issue an order directing the carrier to provide the required service.

Difficult though it may be, we intend to fulfill our responsibility in the adequacy of service area. If that requires formal proceedings, then formal proceedings there will be. In the past few years we have decided several formal adequacy cases, and others are now pending before us.

The real problem is that from whatever vantage point one views formal adequacy cases—from that of the complaining community, the defending airline, or the Board—it is crystal clear that they leave much to be desired. For one thing, they are complicated, long, and expensive. They do not involve a simple, clear-cut issue of the type that might have arisen in yesteryear, such as whether a railroad should be required to provide a heated station at one of its points. Rather they present questions of whether a carrier should be required to furnish a certain class of service, with a particular type of equipment, at specified times of the day or night. They require that the Board consider the effect that any requirement it may impose will have, not just on the complaining community or the airline, but, through possible chain reactions, on other communities down the line. Further, with an industry as dynamic as air transportation, which even now is in the throes of major technological change, a decision on adequacy of service that is restricted to conditions as they are shown to exist by the record may have a short effective life. A pattern of service that meets the standards of adequacy today, may be inadequate tomorrow. The reverse can be equally true.

The question I am posing is not whether formal adequacy of service cases can or should be entirely done away with. It is whether a satisfactory answer to adequacy problems can ever be found by piling adversary proceeding on top of adversary proceeding, and painfully grinding out decision after decision dealing with individual communities and airlines.

We think not. It is for this reason that we have been devoting time and effort, both within and outside our formal proceedings, to developing standards of adequacy that, hopefully, will make formal proceedings the undesirable, though perhaps essential, last resort rather than the routine starting point. It is for this reason that we have been encouraging both airlines and communities to attempt to solve their mutual problems by informal methods and to assist us in developing standards that will make such settlements feasible. And it is for this reason that we have been emphasizing the need in this age of long-range, high speed aircraft for regional airports serving two or more nearby communities as a means of attacking the causes of alleged inadequacies rather than trying to cure them by a series of orders that, at best, may provide only temporary remedies.

Turning to the second part of this point—that of giving direction to formal proceedings—I cite, by way of example, the possible use of the so-called two-step proceeding. Translated, this means a proceeding wherein the agency will first determine the routes that are required in the public convenience and necessity, or in the national interest; and only after this is done will the agency turn to selection of the carrier or carriers to operate those routes.

Like so many other things in the field of procedures, the two-step proceeding has its limitations. With an air route pattern as extensive as that now in existence, it is impossible to separate the question of the routes that may be needed completely from that of the carrier which should be chosen to operate them. Nonetheless, I think there will be situations in which a two-step proceeding of this kind can be used to advantage and I would like to see it tried.

Control over the establishment of air services goes to the heart of the aims of the Federal Aviation Act—an air transportation system adequate to meet the present and future needs of the foreign and domestic commerce of the United States, the Postal the private interests of individual carriers are not a legitimate element of the broader public interest. Certainly, attainment of the broad objectives requires that we not lose sight of the imperative need for maintaining economically sound and healthy carriers.

The individual carriers have a stake—and a big one—in our actions, and I do not propose that we take away their right to contest them fully. My point is only that the contest is not an end in itself, and it must not be allowed to obscure the basic objective of the proceedings. To the extent that we can order our proceedings so as to keep the ultimate objectives in sharp focus, we have made progress toward more effective administration of our statute.

This also suggests the possibility, in instituting proceedings, of making greater use of show cause orders and orders of investigation setting forth tentative findings of the Board. There is no magic in a show cause proceeding. It must go through the same steps as a proceeding begun by any other means. Its value lies in the fact that by presenting the Board's thinking at the outset—tentative though the views may be—it can point up the critical issues that we believe require exploration and thereby impart to the proceeding a sense of direction that will help it more along the shortest and most direct course.

With the many and varying factors that affect route determinations, there is no one procedure that can be followed in all situations. The traditional method of merely setting pending applications for hearing will undoubtedly continue to be desirable in many of them. The important thing, I think, is to be alert and flexible; to examine the individual situations and select in each case the procedures that, under the particular circumstances, hold greatest promise of a meaningful proceeding, and of one that can be disposed of fairly, intelligently and with reasonable dispatch.

Since formal proceedings will always be necessary, my third point concerns improvements in our procedures for handling those matters. This is a big area. The suggestions that could be made for improvement are innumerable. Each of them would offer a fruitful subject for a whole panel discussion. I shall mention only one—that of attempting to simplify the record in the cases.

Again, I will use Board route proceedings as my illustration. In deciding whether new routes should be established and in selecting a carrier, it is necessary to determine the use that will be made of the routes, and the financial results that the operations may have. This requires that we know the revenues and expenses
Service and the national defense. I do not intend to suggest that
of the new service, which, in turn, requires projections into the

future. A tremendous amount of time in Board proceedings is devoted to the preparation, presentation, examination, and analysis of exhibits intended to give this information.

I do not discount the value of the individual exhibits that have been presented to us, or of statistical method itself. However, again it is important to remember that they are not an end in themselves, but a means to an end; and, further, that we are not dealing with an exact science. Otherwise we could soon reach the point of diminishing returns, and could find ourselves spending more and more time and effort quarreling over refinements that, in the final analysis, may not affect the ultimate decision that will be reached, no matter what the answer to them turns out to be.

I am not proposing that we merely rely on experienced costs as shown by the carriers' reports filed with the Board. On the other hand, there is no reason why one of two carriers, having similar routes and comparable economical characteristics, should be able to operate a proposed route at a cost substantially less than that which would be incurred by the other. In short, in situations such as this, exhibits that show wide disparity as between comparable carriers must necessarily be suspect. In the same vein, there is no reason to believe that a given carrier can operate a new service, that does not entail a major addition to its routes and is otherwise comparable to the routes it already holds, at a cost substantially below that it has experienced in the past. I am convinced that a great deal can be done in achieving uniform methods of costing, which will ease the burden on the Board and the parties before it in litigated cases.

We have recently entered into a contract with a private research organization for a study of cargo costs. We hope that out of this will come a formula for the costing of cargo services. If this is successful, as we believe it will be, it offers infinite possibilities for simplifying cost exhibits.

In the meantime, I think we should strive to improve the statistical presentations. If we can do so, we shall have accomplished something that I have long felt a sore need for—standardized exhibits that will provide a yardstick and a basis for an intelligent comparison as we move from case to case in our decisional process.

I look for improvement on improvement in the future, not only case by case, which is necessarily somewhat slow and arduous, but by better methods and procedures which will make for better decisions in better time. I look to the conversion of detractor-observers of our administrative agencies to supporter-observers.

JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS: THE ABA STUDY

By John M. Lynham

About three years ago Mr. Justice Clark, then Chairman of the Section of Judicial Administration, established a Committee designated as the Committee on Judicial Review of Administrative Agency Decisions. This came about after discussions with representatives of the Section of Administrative Law, and the Committee was to make a study and analysis of the whole complex of Federal statutory provisions relating to judicial review of agency action with the ultimate objective of bringing about much needed reforms and some degree of uniformity. The members of the first Committee were and still are Raoul Berger and John D. Connor of the District of Columbia; Harry C. Blanton of Sikeston, Missouri; Judge Charles E. Long, Jr., of Dallas, Texas; Professor Victor G. Rosenblum of Northwestern University in Evanston, Illinois; Judge Robert W. Upton of Concord, New Hampshire; myself as Chairman.

In the beginning the Committee realized that in carrying out such a project the help of research assistants would be needed, and this work was turned over to the George Washington University Law School under the supervision of Professor J. Forrester Davison. The preliminary research undertaken by the University indicated the need for a pilot project to develop a cost estimate of a complete survey and analysis, which would include recommendations as to how the needed reforms could best be accomplished. The Section of Judicial Administration appropriated $1,000, and a pilot project in the field of licensing, together with a survey of the literature in the field of judicial review, now have been completed by the university. The reports on the pilot project and on the literature survey have been reproduced, and copies are available from the Administrative Assistant of the Section of Judicial Administration at ABA Headquarters in Chicago.

In the Committee's preliminary examination of the problem, the various Federal statutory provisions were broadly classified as follows:

(1) The statutory injunction in a three-judge court under the provisions of the Urgent Deficiencies Act of 1913. At first, this

remedy was applicable only to orders of the Interstate Commerce Commission, but later statutes incorporated it into review of some or all orders of the Federal Communications Commission, Maritime Commission, Packers and Stockyards Administration, and Perishable Commodities Administration. In 1950, by the so-called Hobbs Act, jurisdiction was transferred to the Circuit Courts of Appeals, except as to the Interstate Commerce Commission and some actions under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act. Also, originally there was a direct appeal from the three-judge court to the Supreme Court of the United States with precedence over other cases, and this right of appeal continues as to those actions over which the three-judge court still has jurisdiction. In 1954, the Atomic Energy Commission was added to the Hobbs Act review.

(2) The extension of the petition for review in the Circuit Courts of Appeals of orders of the Federal Trade Commission to cover orders under the Securities Act, the Securities Exchange Act, the Public Utilities Holding Company Act, the National Labor Relations Act, the Federal Power Act, the Civil Aeronautics Act, the Natural Gas Act, the Fair Labor Standards Act, the Food and Drug Act, the Federal Communications Act and the Federal Alcohol Administration Act, together with at least ten additional statutes dealing with Army control over toll bridge rates, suspensions of registrations under the Commodity Exchange Act and the Federal Seed Act, revocation of grants concerning foreign trade zones, licensing of custom-house brokers, discriminations concerning second-class mail by freight and Maritime Board orders denying transfers to foreign registry, and the Trust Indenture Act, the Investment Companies Act and the Investment Advisors Act. While some of these acts are administered by commissions such as the SEC, FPC and Maritime, which already were subject to this procedure, these agencies are, since the Hobbs Act, also in some cases subject to it as well. In the Circuit Courts these reviews are to be governed by equitable principles, and the Supreme Court has held that the reviewing courts have general equity powers even though the statute does not so explicitly provide. Other courts may also review these cases when for some reason the statutory method is unavailable. The dual review provisions of the FCC Act in the U.S. Court of Appeals for the District of Columbia and in the District Courts (the U.S. Courts of Appeals since 1950) have also provided difficulties, and a simi-

lar problem has arisen under the Public Utility Holding Company Act.

(3) The statutory petition for review, which was made applicable to certain agencies by the Review Act of 1950 and which was an improvement over the three-judge District Court provided for the Interstate Commerce Commission in the Urgent Deficiencies Act procedure originally devised in 1913.

(4) At least four Federal statutes provide for review of administrative action by a bill in equity in the District Courts, such as the Longshoreman's and Harbor Workers Act, the Agricultural Adjustment Act, the Federal Alcohol Administration Act (as to labeling orders) and injunctions by national banks against the Comptroller of the Currency. Even without these provisions the Federal District courts probably would have review jurisdiction under their general equity powers.

(5) The special statutory provisions for review, such as the provisions for a civil action in a district court by a claimant under the Social Security Act to obtain review of a decision of the Social Security Board, of which there are reported to be cases in the tens of thousands, and the considerable jurisdiction already vested in the Federal courts to grant injunctions under their general equity powers, together with their jurisdiction to render declaratory judgments.

The Hobbs Act of 1950 suggested the need for reform and uniform provisions in providing that the basis for the Court proceeding should be the record made before the agency when there has been a hearing, and that when the agency has properly acted without a hearing and a genuine issue of material fact is presented, the proceeding should be transferred to a District Court for hearing and determination as if it originally had been initiated in the District Court. This act also provides for the taking of additional evidence in any case, for representation of the Attorney General, for stay or suspension of orders, for interlocutory injunctions, for review by the Supreme Court on certiorari or certification, and for rules of procedure in the Circuit Courts.

The above summary is intended only to indicate the varieties and complexities in the review of administrative proceedings and orders, and we soon concluded that any attempt to consolidate the review provisions for all agencies in one statute would have to take these differences as well as similarities into account. In addition, there is a real question as to what agencies or activities of agencies and the Executive Departments should be covered in such a compilation and code. The Court rules adopted under the Hobbs Act should also be collected and studied.

The Government Manual of 1956-57 listed about 63 independent agencies, and the 1958-59 Manual devotes about 200 pages to describing the independent agencies and about 35 pages to Selected Multilateral International Organizations. It is estimated that the number of agencies varies from 70 to 100 at different periods.

Thus it will be seen that the field is enormous and the problems complex. After the pilot study the National Law Center of George Washington University estimated that a complete study and analysis would take about two years and that the cost would be in the neighborhood of $75,000. The Section of Judicial Administration thereafter approved the completion of the project and set about to explore the ways and means whereby the necessary financing could be obtained. Last May a presentation was made to Dean Stason and other representatives of the American Bar Foundation, and we are now happy to report that the Foundation has undertaken to carry out the study with the cooperation of our Committee and of the National Law Center. It is expected that several years will elapse before the final report and recommendations can be submitted, but we are confident that it will constitute an original and much needed contribution in this perplexing field.

ROLE OF THE FEDERAL TRIAL EXAMINERS CONFERENCE

By Edgar A. Buttle, *President*

The Federal Trial Examiners Conference is a professional association of hearing examiners of all Federal regulatory agencies and departments conducting quasi-judicial proceedings under the Administrative Procedure Act. The primary function of the conference is to advocate improved administrative due process and appropriate methods of assuring its efficient application. In this connection our conference has established working committees for the purpose of reviewing and comparing hearing practices and procedures among the Federal administrative agencies and for the further purpose of recommending improvement in such practices and procedures if needed changes are apparent. This year we plan to have discussion meetings open to the bar and hearing officers and attended by leading jurists, legal scholars, and agency members as panelists.

A hearing examiner functions as the presiding officer over hearings which the Federal administrative agency members are unable to conduct because of the exigencies of time. These hearings involve complex labor-management disputes, unfair trade practices and antitrust issues, competitive applications for radio, television, motor, rail, water and air carrier, gas and oil transmission line licenses, as well as difficult rate and merger proceedings—to name but a few of the major problems which pervade the national economy. Numerous adversary parties and millions of dollars of private interests are frequently involved in one of these proceedings. The examiner impartially articulates and publishes an initial decision containing findings of fact and conclusions of law based upon the record and after receiving briefs from the contending parties, many of whom are represented by the nation's foremost lawyers. Thereafter, the initial decision may be reviewed by the agency and subsequently in some cases by the United States Circuit Court of Appeal and the Supreme Court itself.

Judge E. Barrett Prettyman has stated in his *Trial by Agency*, that "administrative law is important, indeed . . . it is the most important category of law current in our land."

Dean James M. Landis in testifying before the Sub-committee on Administrative Practice and Procedure of the Senate Judiciary Committee recently said:

> There are a series of problems relating to hearing examiners that I do not want to bother you with today, but a remarkable development in administrative law has been the increase in stature and in respect shown the hearing examiners in the last 25 years.
>
> I recall that in 1934, our practice in the Securities and Exchange Commission was that when we found a lawyer in the legal division that wasn't any good, we would make a hearing examiner out of him, because it was inconsequential. Nobody paid any attention to his decision anyway, and he just had to sit there and listen to the evidence. But that isn't true these days. We are developing remarkably good hearing examiners.

As suggested by Judge Prettyman and Dean Landis, administrative quasi judicial proceedings have gained importance and the stature of those who preside over them has risen. These changes, however, have been the result of unrelenting efforts of those in the Administrative Law Section of the American Bar Association. I am sure the Administrative Law Section will continue to accept this challenge as they have in the past, giving full support to an improved hearing examiner program. Some pending bills consistent with prior positions taken by the American Bar Association should be supported. These bills, if enacted, will further improve the stature of administrative proceedings and quality of applicants for hearing officer positions. Of particular importance at this time are the following:

First, S. 1732, increasing the salaries of hearing examiners of the major regulatory agencies to the equivalent of grade G.S. 16 and the salaries of such examiners of other agencies to the equivalent of G.S. 14; also H.R. 7377, a later bill, substantially the same but providing for the equivalency of the maximum of G.S. 16 and G.S. 14 grades. These administration bills are endorsed by the Federal Trial Examiners Conference at the maximum equivalency. They are seen only as a step in the right direction—if enacted at this session of Congress. The conference, nevertheless, concurs with the Report of the Committee on Hearing Examiners, American Bar Association, Administrative Law Section, dated June 20, 1961, that the appropriate grade or equivalency thereof should be the G.S. 18 level. The unyielding attitude taken by this Section of the American Bar Association is greatly appreciated.

Second, S. 1734. The purpose of this bill is indicated by Senator Carroll, Chairman of the Subcommittee on Administrative Practice and Procedure of the Judiciary Committee, as:

> to provide a practicable method of attacking the huge—almost notorious—backlogs which today exist in the dockets of all of the independent agencies and executive departments which are responsible for the carrying out of the regulatory laws which the Congress has passed. The bill proposes to reduce, if not eliminate entirely, these backlogs by calling upon the skill and devotion of the hearing examiners by authorizing them to make, in all but the rarest of instances, the final agency decision in these matters.

The Conference has endorsed this bill with a few proposed suggestions. These recommendations include:

1. More flexible grounds for agency discretionary review since the present limited grounds enunciated by the bill appear to be incomplete and have, therefore, met with substantial agency opposition. For example, the bill does not clearly provide for review where certain equitable considerations may be involved, or where improved decisional clarity would enhance policy construction.)
2. A provision whereby hearing officers of all agencies would be authorized to dispose of motions including interlocutory motions during the course of prehearing conferences and otherwise.
3. Authority to hearing officers to disbar attorneys from practice before the agency because of misconduct subject to agency review. The FTC rules now so provide.
4. Authority to hearing officers to sign as well as issue subpoenas since some agencies presently do not impute authority to issue as authority to sign.
5. Authority to hearing officers to limit the record by excluding cumulative evidence not coming within the category of repetitious evidence now excluded by the bill.
6. A change of the title "Hearing Examiner" to Hearing Commissioner or Trial Referee or Judicial Master as suggested by Senator Carroll.

Third, S. 2189, a bill to establish an office of Federal Administrative Practice and to provide for the appointment and administration of a corps of hearing commissioners is also of great importance. This bill was introduced by Senator Keating on June 29, 1961, and was referred to the Senate Committee on the Judiciary.

As emphasized by Dean Landis and advocated by the American Bar Association, adjudication must be an independent act. Otherwise due process prescribed by the Administrative Procedure Act is a mere deceptive mirage and a hoax imposed upon the public. The prosecuting or intervening segment of the government cannot impartially evaluate evidence in resolving issues before it judicially. The exercise of both functions of government (as an interested party and judge) can result only in dereliction of duty as to one function or the other. The hearing examiner program was devised to avoid the ill effects of this dual role and to permit agency review so that policy of the agency could be coordinated. The independent quasi judicial authority subject to agency review which has been delegated to hearing examiners must not only be exercised impartially in fact, but also in appearance if it is to serve the purpose intended by the Administrative Procedure Act. An independent office of Federal Administrative practice contemplated by S. 2189 will assure impartiality in appearance as well as in fact, and will be conducive to efficiency and uniformity in administrative procedures.

Fourth, Section 1006(b) of S. 1887 is also worthy of endorsement. S. 1887 is a bill to recodify with certain amendments thereto, chapter 19, title 5, of the United States Code, entitled "Administrative Procedure." It is to be noted that Section 1006(b) duplicates in part the provisions of S. 1734. The bill should be revised to make it consistent with other pending legislation.

BOOK REVIEWS

ADMINISTRATIVE REGULATION. Law and Contemporary Problems. Durham: Duke University School of Law. Vol. XXVI. Spring, 1961. Pp. 346. $2.50.

The Spring, 1961 issue of *Law and Contemporary Problems,* published by the Duke University School of Law, is devoted to a symposium of seven articles discussing the many faceted concept of "administrative regulation" from the varying points of view of political scientists, public administration specialists, and lawyers. This series was inevitably prompted by the recent close scrutiny of the administrative process at congressional and executive levels. The authors, however, adopt the whole of the regulatory process as their universe and do not limit themselves only to the narrower issues developed in current structural and procedural debates. In fact, the peripatetic reader wandering into this subject matter might be confused about the exact nature of the recent problems since he would be exposed to an entire complex of materials which amount to a syndrome of problems of regulation along with a catalogue of past and present antidotes.

The articles are particularly useful and informative on the following: (1) methods and techniques for needed research in substantive decision making; (2) the historical development and rationalization of administrative regulation; (3) the formal and informal institutional roles of Congress, the President, and the A.B.A.; and (4) analysis of regulation as a distinctly political activity.

It is significant that the editors have selected opening and concluding articles which emphasize the desirability of greater research into policy formation and execution. The lead article, "The Regulatory Process," by Mark S. Massel expresses concern that we spend too much time debating about procedural reforms when we should be examining the determination of substantive policy issues as a political process. He indicates that the preoccupation of lawyers with incremental procedural changes prevents the probing development of standards for evaluating the heart of administrative regulation.

Massel states:

> Above all, we need further empirical research and broad analysis to clarify how regulation works. We require a clearer understanding of where the process fits into the complex of our economic, political, and social goals. We should have more definitive information of just how the participants in the process function. We badly need a broader view of the basic issues that deserve attention.

One primary objective of such empirical study of administrative agencies of all types is the development of generalizations which explain to us in part how the process operates. Our capacity to communicate effectively may also be dependent upon the establishment of new concepts about regulation. This point is amplified by Marver H. Bernstein in the final piece in the series, "The Regulatory Process: A Framework For Analysis." Bernstein believes that our discussion of the administrative process is hampered by old categories of analysis which are inadequate. Such familiar categories include separation of powers, rule making vs. adjudication, regulation vs. promotion, and commissions vs. noncommissions. He states that "these classifications have focused not only on policy considerations and goals of public policy, but rather upon mechanistic concerns." The effort must be made to develop an "analytical synthesis of the regulatory process' based on empirical studies of the agencies, formations of new concepts and categories, and the successive building of higher levels of generalization. As a political scientist Bernstein is interested in the interpretative and explanatory results and the predictive value of generalizations.

He indicates that much work must be done on the policy formation process, the policy issues involved in regulation, and the political context of this activity. Reference is made to on-going research directed by Bernstein at Princeton with an examination of a set of interesting preliminary hypotheses drawn from evidence about seven agencies. The comparative technique is used in noting similarities and differences between agencies.

The use of comparison is also considered by Fritz Morstein Marx in his article, "Administrative Regulation In Comparative Perspective." Lawyers are, of course, completely familiar with the uses of comparison as a basic device in developing legal arguments. But Marx applies the technique to inter-nation analysis. We have much to learn about our own system through examination of regulatory methods in other countries. Although we may be relatively uninterested in adopting features of other systems, comparison may provide an understanding of strengths and weaknesses of our own system as well as a forecasting of our basic development trends. One of the fundamental items to be compared would be the underlying social basis for regulation. Morstein Marx reviews the various degrees of regulatory urge existing in our society as a catalyst for different types of governmental activity. The growth of our regulatory institutions is compared with the evolution of various European devices used to cope with the industrial revolution. The explanation of the longevity and vitality of European administrative law is offered as a guidepost to our own experience.

Reflection on the social rationale of regulation is again part of the commentary in "Issues and Accomplishments In Administrative Regulation: Some Political Aspects" by Winston M. Fick. The author is basically interested in the political forces that create the particular administrative system. After noting several basic ideological elements underlying the specific type of regulatory process we have nurtured, the author examines the political relationships between the agencies and other branches. The final part of the article offers an excellent summary of several types of commentaries on the actual operation of administrative regulation.

The foregoing articles represent an approach which seeks explanation of the processes involved. Interest in this type of analysis is indicative of recent trends in the political science discipline. Much of the current effort by scholars is aimed at an understanding of decision making in a social and political context. Instead of a more traditional concern for description of governmental structures and institutions, the focus is upon how decisions may come about and the evaluation of those decisions. With the rewards of empirical findings on how a regulatory system may actually operate can come a highlighting of problems which can be much more fundamental than procedural criticisms we have considered lately.

Perhaps this broader perspective is unproductive in the sense that it may not offer us any immediate panaceas. But with the ultimate understanding and explanation of how this process actually functions we may make our political choices as to form and content of regulatory policy considerably more intelligent. It may well be that the values we presently hold about regulation may change with the growth of information. Our current values about the extent of regulation, judicial protection, expertise, etc. may be turned around with the exposure to new concepts, comparative data, and different generalizations about the regulatory scheme.

Another important article in this series is "A Lawyer's View of Administrative Procedure—the American Bar Association Program" by Robert M. Benjamin. Its utility is at several differing levels including an eloquent statement in behalf of the lawyers's traditional concern for fair procedure:

> . . . *The public interest, with which administrative agencies are charged, includes an interest in procedures fair to those whom they affect.* And there is more to this than "Sustaining" the "Consent of the governed." Fair procedures will give opportunity to those whom they affect to have their views adequately heard and considered, and to be informed of and to have opportunity to controvert opposing views. Such procedures will advance the obvious public interest that administrative action be informed and considered.

What follows is a superb documenting of the history of the A.B.A.'s role in propounding changes in administrative procedure. Students of administrative law will find this particularly useful as a secondary source of reference to a mass of basic material. The footnotes bulge with annotation to the recent development of the administrative system.

Persons interested in the pluralistic division of the public into interest groups will find this an incisive comment on the activities of the American Bar Association. This adds to our appreciation of the political process in which the A.B.A. is intricately involved. This is done through discussion of the A.B.A.'s legislative program resulting in the Federal Administrative Practice Act and its proposals for specialized courts and a Code of Federal Administrative Procedure.

The political factors are also dealt with by Ferrell Heady and Eleanor Tabor Linenthal in a joint effort, "Congress And Administrative Regulation." The viewpoint is institutional with the focus upon the role of Congress in structuring the administrative agencies. After a solid historical account of congressional activity in the 30's and during the APA debate, the authors review the whole range of current proposals for congressional action. Possible alternatives are detailed under the following outline:

> It remains to be seen whether Congress will see fit to tackle some of the current problems of administrative life by (1) piecemeal changes in existing requirements as to procedure; (2) legislation that would focus on changes in the structural organization of the administrative process; (3) an emphasis on the possibilities of agency self-improvement; (4) a new uniform code; or, (5) resort to increased congressional oversight.

Included in the discussion of item (2) is comment on the value of congressional evaluation of the substantive policies of the agencies.

Another articulate consideration of the institutional parts of policy formation is found in the article, "Responsibility Of President And Congress For Regulatory Policy Development" by Hugh M. Hall, Jr. Much of the material is devoted to the notion of greater integration of agencies within the executive branch as contrasted with the theory of independence. Although the functions of the President and Congress are well defined, Hall points to varying activities of these branches according to prevailing political outlooks as to the structure of the agencies. Prospects for effective changes in the balance between the branches are also reviewed.

A survey of this volume illustrates the usefulness of a colloquium in handling such a wide range of issues. All important aspects of administrative regulation are referred to. Highly complex factors of this process receive excellent commentary and analysis. Students will find this a superb entry into the vast area of problems in the field. Lawyers will discover this to be a sound review of the background of recent reform suggestions as well as a stimulus to orient their own thinking in terms of new approaches. Political Scientists will consider this a probing, exploratory set of suggestions as to the real nature of this process. This issue of *Law And Contemporary Problems* should receive the attention of those seriously interested in regulatory problems.

William F. Cottrell

CHAIRMAN'S PAGE

Who does not recall smiling indulgently upon first learning of Baron Parke's ("Baron Surrebutter") delight in turning a case upon a nice point of common-law pleading, and one's complacent self-gratulation upon living in more enlightened times when we thrust procedural thickets aside to plunge into the merits.

In large part, administrative law proceeded from a desire to escape from the "cumbersome, complicated" processes of the courts to a simple, readily understood procedure. Is administrative procedure really simple? The jungle of obscurity which today surrounds the question, for example, whether a given agency order is reviewable, would have caused Baron Parke to smack his lips. Consider the 86 pages a recent text-writer requires to explain the intricacies of "standing to sue,"[1] the 91 pages required to enumerate the pitfalls of "ripeness,"[2] the 115 pages needed to explain the complexities of "primary jurisdiction" and "exhaustion of administrative remedies,"[3] all of which are conditions precedent to judicial review. What abstruse point of pleading in Baron Parke's time required the like? Myself no tyro in these matters, I have often and despairingly concluded that it would baffle the 7th son of a 7th son to predict with confidence whether or not a given order would be reviewed. This is a reproach to administrative law.

The other side of the coin is the fear of creating a "monolithic" structure without regard for the differences in the tasks confided to the various agencies. In this view, every agency is *sui generis,* a law unto itself. So Mr. Justice Frankfurter could say that

> "Apart from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction. There is no such thing as a commen law of judicial review in the federal courts."[4]

If this accurately corresponds to the present status of "judicial review," it is largely because judicial review of administrative action, like Topsy, "just growed," not because the subject matter is inherently insusceptible of rationalization. The fact that there is a common federal approach to judicial relief, both trial and appellate, in matters as diverse as negligent injuries, antitrust violations, labor injunctions, patent and trade mark matters, railroad receiverships, etc., etc., suggests that there are no insuperable obstacles to the fashioning of simple, easily understood, uniform procedures for judicial review of agency action. A significant step in this direction is to be found in § 1009 of the proposed ABA Code of Administrative Procedure.

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[1] 3 Davis, Administrative Law Treatise, pp. 208-294 (1958).

[2] *Id.* at pp. 116-207.

[3] *Id.* at 1-115.

[4] Dissenting opinion in Stark. v. Wickard, 321 U.S. 288, 312 (1944).

We need constantly to ask whether substantive differences compel procedural differentiation. The Federal Rules of Civil Procedure and the Administrative Procedure Act, at least, spring from the contrary premise. It needs still to be proven, not assumed, that a railroad rate case requires an entirely different trial and appellate procedure than does an air rate case, that both need still different procedures from a Stockyards rate case or a gas rate case. Until that is proven, I would say, paraphrasing Gertrude Stein, that "a rate case is a rate case is a rate case." If no attempt has yet been made to achieve uniformity in the rules applicable to agency adjudicatory proceedings, the lack may be attributable to inertia rather than intractability of the subject matter. Perhaps it may be necessary to deal differently with ratemaking than with licensing or with violation of statutory requirements. But certainly 57 varieties of rules for essentially similar adjudicatory proceedings have neither rhyme nor reason.

In this I am emboldened by Judge Prettyman's remark anent the first President's Conference on Administrative Procedure:

> "It was quite amazing to see how some fellow would come in from some agency and think he had a peculiar problem that never happened before in the history of the world. When he mentioned it he found there were maybe a dozen other agencies that had the same problem in slightly different form. They all learned that they are dealing procedurally with somewhat similar problems." [5]

And perhaps a not-sufficiently appreciated advantage enjoyed by the Section of Administrative Law is that we do not conclude that the entire elephant is like the ear, or the tail, or the trunk, but rather that we see the elephant—the entire administrative process—whole.

The path of procedural reform has been in the direction of simplification, witness the substitution of Code for common-law pleading, of the FRCP for the antecedent less ordered practice. A pioneer step in this direction was made by the Administrative Procedure Act. But we would be derelict were we to regard it as more than a beginning, for it is given to no generation to formulate ultimate answers. Procedural simplification in the administrative law field remains a crying need. Ours is the task of plowing new ground, never forgetting that the history of our liberties can be written in terms of the struggle for procedural safeguards.

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[5] Quoted 12 Ad. Law Bull. at p. 189 (1960).

RAOUL BERGER, *Chairman*

RESOLVING UNCERTAINTIES UNDER OUR ANTIMONOPOLY LAWS THROUGH ADMINISTRATIVE ACTION

By Everette MacIntyre *

Businessmen and others of the public seek but do not find an unqualified answer to the question, "What trade restraints and monopolistic acts are unlawful?" It requires no great amount of legal research to find out why that is true. The Anglo-Saxon common law has dealt with trade practices and monopolistic acts over a period of centuries. However, under the common law, trade practices and monopolistic acts are unlawful only when employed with the intent to coerce or damage a competitor or for the promotion of a monopoly.

Statutory law in this country regarding the subject is, with the exception of a few provisions applying to particular acts, almost as general and indefinite as the common law. Of course, when the Sherman Antitrust Act was passed in 1890, it was thought that the language of its provisions made more definite the law for the regulation of interstate and foreign commerce. Particular basis for that thought is found in the words of the first section of that law to the following effect: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal," and the words of Section 2 to the effect that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any ther person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

First, proposals were made that the Sherman Act be amended to provide for some exemptions from its application to certain conditions and practices. Those proposals were rejected. Then proposals were made to make the application of the Sherman Act more flexible by making it effective only where trade restraints and monopolistic conditions were found to be *unreasonable*.

At first the Supreme Court rejected proposals that it make the

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* Commissioner, Federal Trade Commission.

Sherman Antitrust Act indefinite by reading into it an interpretation which would make it applicable only to *unreasonable* restraint of trade.[1]

These proposals would have amended the Sherman Act to permit the continuation of a number of combinations in restraint of trade.[2]

Although these proposals were not acted on by the Congress, the law, through the process of judicial interpretation, was made almost as general and broad in its sweep as the common law of England and this country. A part of this development was the decision by the Court in the Standard Oil Case.[3] In that case the "rule of reason" was read into the Sherman Act and that law was, thereby, made to apply only to *unreasonable* restraints of trade. It was reasoned that the Sherman Act ". . . followed the language of development of the law of England." In that connection the Court held:

> "The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.
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> "Thus not specifying but indubitably contemplating and requiring a standard it follows that it was intended that the stand-

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[1] U.S. v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897); U.S. v. Joint Traffic Assn., 171 U.S. 505 (1898).

[2] In 1909, Sen. 6440, introduced in the 60th Congress, 2d Sess., proposed to amend the Sherman Act to give all corporations except railroad companies (already subject to the Interstate Commerce Act) immunity from antitrust prosecution unless notified within thirty days by the Commissioner of Corporations, with the concurrence of the secretary of Commerce and Labor, that any proposed contract or combination filed with the Commissioner of Corporations was in unreasonable restraint of trade. It would have limited the amount of recovery in a civil action for injury to business under Sec. 7 to single instead of threefold damages and, according to the Senate Judiciary Report on it, would have provided "that no prosecutions under the first six sections of the act should be maintained for past offenses unless the contract, or combination, be in unreasonable restraint of trade. . . ." Sen. Rept. No. 848, 60th Cong. 2d Sess. 9 (1909). The Senate Judiciary Committee rejected the proposed amendment, saying that to make "civil and criminal prosecution hinge on the question of reasonableness or unreasonableness . . . destroys . . . the provisions of the act as to criminal prosecutions, and renders them nugatory, and opens the door wide to doubt and uncertainty as to civil prosecutions. . . . The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries." Guthrie, Constitutionality of the Sherman Anti-Trust Act of 1890, 11 Harv. L. Rev. 80 (1897) at 9-11.

[3] 221 U.S. 1.

> ard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

Thus it is seen that the Sherman Act thus interpreted is as Mother Hubbard's dress, covering almost everything but touching nothing in particular. The uncertainties inherent in such a situation were aptly described in the opinion of Justice Harlan, a member of the Supreme Court who participated in the decision in the Standard Oil case. He said:

> "To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries.* What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination unreasonable."

The Federal Trade Commission Act is couched in general terms, making unlawful unfair methods of competition and unfair and deceptive acts and practices. The Supreme Court has ruled that the words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. However, they have held them to be applicable to practices opposed to good morals because characterized by deception, bad faith, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. Woodrow Wilson appreciated the need for businessmen to be more precisely informed about the meaning of these general terms of the law. For that reason, in 1914 he asked two things:

(1) He asked that some additional legislation be enacted, stating that—

> "The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit

> legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is.
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> "Surely we are sufficiently familiar with the actual processes and methods of monoply and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.[4]
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> "I think it will be easily agreed that we should let the Sherman antitrust law stand, unaltered, as it is, with its debatable ground about it, but that we should as much as possible reduce the area of that debatable ground by further and more explicit legislation; and should also supplement that great act by legislation which will not only clarify it but also facilitate its administration and make it fairer to all concerned." [5]

Congress responded to these suggestions by taking under consideration proposals contained in a bill introduced by Congressman Clayton of Alabama. Out of that grew the Clayton Antitrust Act, among the provisions of which are those condemning price discriminations, tieing and exclusive dealing arrangements, certain mergers and acquisitions, and interlocking directorates.[6]

(2) Wilson also asked that a Federal Trade Commission be created. He wanted such an agency, among other things, to assist businessmen in securing a better understanding of their responsibility under the law. In that connection, he stated:

> *"It is of capital importance that the businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety.* It is as important that they should be relieved of embarrassment and set free to prosper as that private monopoly should be destroyed. The ways of action should be thrown wide open." [7]

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[4] *"The New Democracy,"* Woodrow Wilson, Vol. 1, p. 85.

[5] *Ibid.*, p. 75.

[6] 15 USC 12-19.

[7] Messages and Papers of the Presidents, Vol. XVI, Bureau of National Literature, Inc., pp. 7909-10.

On September 2, 1916, in his speech of acceptance on renomination to the presidency, Wilson restated his view of the function of the Commission in the following terms:

> ". . . a Trade Commission has been created with powers of guidance and accommodation which have relieved businessmen of unfounded fears and set them upon the road of hopeful and confident enterprise.[8]
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> ". . . We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to co-ordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. . . . The Trade Commission substitutes counsel and accommodation for the harsher processes of legal restraint. . . ."[9]

It is clear that it was intended by Wilson that with the establishment of the Federal Trade Commission we would have an agency which would apply the law against unfair trade practices on a broad basis in an effort to eradicate harmful practices in their incipiency. It was thought this would be done by specifying harmful trade practices item by item. In this way, it was thought, businessmen would be assisted in avoiding the continuation of practices which would make them liable as criminals under the Sherman Antitrust Act.

Unless the Federal Trade Commission undertakes the specification of harmful trade practices item by item, which probably would lead to trade restraints violative of the Sherman Act, businessmen will be left without guide lines of what is legal and what is illegal under our antimonopoly laws.

It is clear that the national public policy against monopolies and monopolistic practices and conditions precludes any thought of cutting down the scope of the sweep of the Sherman Act and the Federal Trade Commission Act. On that point, the Chief of the Antitrust Division of the U.S. Department of Justice has made this statement:

> "*When asked for comment on a legislative* proposal for antitrust exemption, we will take a long, hard look. With exceptions already covered by existing laws, we have seen no persuasive case for compromising any antitrust principles in special cases."[10]

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[8] *Ibid.*, p. 8151.

[9] *Ibid.*, p. 8158.

[10] Hon. Lee Loevinger, Asst. Attorney General, Record of the Hearings before American Bar Assn., Section of Antitrust Law, Vol. 18, pp. 103-4, April 6, 1961.

From existing circumstances and our experience, it is clear that public policy will continue to dictate that our antimonopoly laws continue with their broad sweep covering a multitude of unspecified trade practices and conditions. It cannot be expected that the Congress will undertake to specify in new legislation each of the trade practices and conditions likely to fall within the broad sweep of the Sherman Act and the Federal Trade Commission Act. Therefore, businessmen and the public are unlikely to enjoy flexibility, breadth and certainty under our antimonopoly laws unless there is action from day to day by an administrative law agency such as the Federal Trade Commission, devoted to spelling out and specifying what trade restraints and condiitons are unlawful, and aiding in the establishment of guide lines for avoidance of pitfalls leading to violations. Reference has been made to the responsibility of the Commission to proceed against unfair trade practices on an industry-wide basis. Hope has been expressed that the Federal Trade Commission will give attention to its responsibilities in this regard.

Considerable discussion has centered on the power of the Federal Trade Commission to make substantive rules which would cover industry-wide unfair trade practices. In this discussion, Section 6(g) of the Federal Trade Commission Act has been cited. It provides:

> "Sec. 6. That the commission shall also have power—(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

It is reasoned that this provision of the law could be relied upon to aid the commission in carrying out its responsibilities in prohibiting the unfair methods of competition and unfair and deceptive acts and practices made unlawful by Sec. 5 of the Federal Trade Commission Act.

This idea is not new. For a substantial period of time the Commission has utilized a trade practice conference procedure for the purpose of informing itself about industry-wide practices alleged to be unfair. It has proceeded to utilize that information in formulating statements of what the Commission believed to be applicable as law to the trade practices in question. These statements were designated as Trade Practice Rules and were designed to afford guidance to industries and enable them to voluntarily operate in compliance with the interpretations of the law by the Commission and the courts. It was hoped that through such advisory rule-making procedures there would be voluntary compliance with the acts administered by the Commission.

The Commission as early as 1918, some three years after its organization and nearly one year before its first formal case was decided in the courts,[11] was confronted with an industry-wide practice of misbranding gold finger rings. In lieu of proceeding formally against the individual manufacturers involved, the Commission designated a Commissioner to hold conferences with members of the industry and recommend an acceptable disposition of the entire matter, which would end the abuse and eliminate the resultant consumer deception. As a result of that conference, the members agreed upon proper markings for their products which were acceptable to the Commission, and that agreement became effective on May 1, 1919. The records indicate that the agreement was 100 per cent effective and ended the abuse.

Since that early beginning there has gradually evolved the Commission's present Trade Practice Conference Program. In the intervening years, in excess of 250 United States industries have, at one time or another, operated under various forms of trade practice rules. Today, rules are in effect for 163 industries. Huston Thompson, Chairman of the Commission in 1921, has written that the Trade Practice Conference procedure was developed to meet situations where one member of an industry started an unfair method of competition and others in the industry were forced to adopt it in the interest of self-preservation, with the result that the Commission would be deluged with complaints.[12]

Trade practice conferences have been initiated at all stages in the progress of unfair practices within an industry. They have run the gamut of fairly standard rules where the law has been well settled in case decisions and the practices fairly uniform to the detailed working out of express standards for guidance of industries early in the history of the emerging industry and in the initial stages of unfair practices within the industry.

In more recent years, the trade practice rules have been more often utilized to afford detailed and specific guidance to industry on specific problems of compliance which were peculiar to the industries affected and in the early stages of the use of unfair methods. Illustrative of this trend was the promulgation of the Rayon Rules.[13] This new industry, producing a product which closely resembled silk in appearance and texture, was susceptible of deceiving consumers by its appearance alone, and, additionally, terminology was developing in the many industries using the product which enhanced that deception. The Rayon Rules carefully spelled out detailed instructions concerning the requirements of effective marking of products made of the material and prohibited specific designations. These rules have been revised through the years to meet additional problems with the technological developments of composition and manufacture, and they were a forerunner of the present Textile Products Labeling Act.[14]

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[11] Sears Roebuck and Co. v. Federal Trade Commission, 285 Fed. 307, C.C.A. 7 (1919).

[12] Jan.-Feb., 1940, *George Washington Law Review*, pp. 268, 269.

A cursory examination of trade practice rules enacted in the past 10 years shows that the Trade Practice Conference procedure has been used increasingly in industry after industry to afford guidance to members in new industries or where practices deemed violative of Acts administered by the Commission were in the initial stages.

An example is the recently promulgated rules for the pleasure boat industry.[15] That industry, as you know, has had tremendous growth in the past few years. Competitive as well as deceptive practices grew with the expansion of the industry. They involved representations as to power, safety, composition of hull, durability, and confusing guarantees. In cooperation with that industry, the rules carefully spelled out answers to all of these and other problems, which, if not solved, would have resulted in involvement with the Commission by a substantial segment of the industry and multiple practices.

It is difficult, if not impossible, in the case of many rules to evaluate their effectiveness for a number of reasons:

1. No accurate measurement of the number of violations existing prior to promulgation of the rules is available;
2. In most such proceedings there is no thorough, complete industry-wide investigation after the promulgation to determine the number and nature of continuing violations; and
3. In increasing numbers of industries, rules involving specific practices have been developed early in their usage, and their

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[13] Rayon Industry, promulgated 10/26/37.

[14] Textile Fiber Products Identification Act (approved on September 2, 1958, 85th Cong., 2d Sess; 15 U.S.C. § 70, 72, Stat. 1717), promulgated on March 3, 1960.

[15] Promulgated on August 4, 1961.

service lies not only in ending existing abuses, but it is frequently much greater in the prevention of future abuses.

Students of FTC procedure and the laws it administers have praised the benefits of the Trade Practice Conference procedure. An article in the George Washington Law Review[16] concludes that the procedure "has performed for industry and the public a great educational service, the value of which in eliminating unethical practices, and cutting the cost of law enforcement, cannot be voerestimated."

The Attorney General's Committee on Administrative Procedure[17] made this statement:

> ". . . even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process. No study of administrative procedure can be adequate if it fails to recognize this fact and focus attention upon improvement of these stages."

In a number of cases where the courts have had occasion to consider the applicability of trade practice rules in particular cases, they have commented favorably on the rules and upheld the principles enunciated in them.[18]

In addition to these cases, the value of interpretive opinions and rules has been often considered and examined by the Supreme Court. Perhaps the Supreme Court's opinion of such procedures is best summed up in the case of *Skidmore* v. *Swift & Co.*[18a] as follows:

> ". . . The Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. * * * This court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

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[16] Silver Anniversary Edition, Jan.-Feb. 1940, p. 450.

[17] Final Report published 1941, on p. 4.

[18] Prima Products, Inc., et al. v. Federal Trade Commission, 209 Fed (2d) 405, (2d Cir., Jan. 7, 1954). Northern Feather Works, Inc. and Sumergrade & Sons v. F. T. C., 234 F. (2d) 335 (3rd Cir., 1956). Lazar et al., v. F. T. C., 240 F. (2d) 176, (7th Cir., 1957).

[18a] 323 U.S. 134 (1944).

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

On September 15, 1955, the Commission initiated a new method of interpretive rules in the form of Guides. The first Guide adopted on the above date covered cigarette advertising. Prior to the adoption of those guides, the Commission had obtained final cease and desist orders in seven cases and negotiated 17 stipulations involving cigarette advertising.

In 1954 and early 1955, the Cigarette Industry embarked upon an intensive advertising program of filter-tip cigarettes. That advertising campaign coincided with widely disseminated information linking cigarette smoking to adverse effects on health. Since the adoption of the Cigarette Advertising Guides, in excess of 200 individual instances of questionable claims have been promptly discontinued when brought informally to the advertiser's attention. Of equal or greater importance is the fact that in substantial numbers of instances where new advertising themes in that industry were contemplated, they were and are presented to the Commission staff in advance and then conformed to the informally expressed views of the staff, thus avoiding the dissemination of deceptive claims in the first instance.

The Commission's files are replete with information to the effect that in many instances the wide publicity given to the Commission's Trade Practice Rules and its statements of Guides, have had a wholesome effect in improving compliance with law. However, the sad fact about the matter is that in a number of very important areas, industry-wide practices adverse to the trade generally, and apparently inconsistent with the law, have been continued despite the full light of pitiless publicity of the Commission's Trade Practice Rules and Guides. In these instances, it would appear that what is needed is some mechanism to enforce, on an industry-wide basis, a compliance with the law against unwholesome and destructive trade practices. This is particularly true in those instances where the use of the unfair trade practice involves large numbers, perhaps hundreds, in a given industry. Obviously, it is impractical and, perhaps, unfair, to proceed against one or two in such a situation through litigation, and leave the others free to continue the questionable practices.

In recent months, concern with this crisis in the administrative process has deepened. More than ever it is believed that these untested but promising rule-making procedures should be explored for use as a supplement to adjudicative work. Pursuant to specific statutory authority, the Federal Trade Commission and other administrative agencies have already engaged in broad-scale substantive rule-making; and these processes have consistently been validated in the courts. Examples are this Commission's rules under Fur, Wool, Textile and Flammable Fabrics Acts, as well as far-reaching rule-making activities of the Food and Drug Administration, Treasury Department, and Internal Revenue Service.

While it may be contended that these are specialized grants of power in closely-defined regulatory contexts, it is believed that adequate substantive rule-making authority exists under the Commission's organic statute to permit this kind of rule-making proceedings. Reference is made to the broad powers of Section 5 of the Federal Trade Commission Act. Also, as has been stated, Section 6(g) of the Federal Trade Commission Act empowers the Commission "from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." This authority in terms, is plenary; and there is nothing elsewhere in the statute to suggest that Congress did not intend Section 6(g) be given an expansive construction consistent with the purposes of the legislation. Thus, the courts have already made it clear that the Commission's Rules of Practice, properly adopted pursuant to the basic statutory grant of Section 6(g), have the force and effect of law.[19] Should it be conceded, short of a judicial declaration, that substantive rules properly adopted under Section 6(g)'s grant would be any less valid? The public interest now commands an early test of whether Sections 5 and 6(g) afford sorely needed substantive rule-making remedies in aid of lagging quasi-judicial authority.

The rule-making process, as has often been pointed out, is that aspect of the administrative process most analogous to the statute-making power of the legislature. It is thus to be contrasted with the administrative adjudicative process, which most resembles the decision-making of the courts. Too often, in stressing adjudicative powers and in analogizing our activities to those of the courts, we fail to remember that both functionally and conceptually we are fundamentally an agent of the legislature. As the Supreme Court said in *Humphrey's Executor* v. *United States,*[20] the Commission's duties are not only quasi-judicial but also quasi-legislative.

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[19] Kritzik v. Federal Trade Commission, 125 F. 2d, 351 (7th Cir. 1942); Hill v. Federal Trade Commission, 124 F. 2d 104 (5th Cir. 1941).

Professor Fuchs defines rule-making as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations;" [21] and another commentator states that "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in an individual capacity." [22]

Rule-making and adjudication are necessary and complementary weapons in the arsenal of administrative powers. So long as appropriate procedural safeguards are provided, the agency's choice of one mode or the other is not subject to judicial attack. In the noted *Storer* case,[23] for example, we find a dramatic example of the government's using rule-making and adjudication as its one-two punch. There the Federal Communications Commission, without hearing, denied Storer's application for an additional television station license. The sole basis for this denial was that granting the application would violate a Commission rule against a multiple ownership of stations. That rule had been enacted earlier the same day.[24]

On November 30, 1961, the United States Court of Appeals for the District of Columbia, in the case of *Wisconsin* v. *Federal Power Commission et al.,* held that an action by the Federal Power Commission to set guide lines by which it will be controlled in its regulatory functions is within its authority under the Natural Gas Act. Under that Act the Federal Power Commission was authorized to make determinations regarding rates, charges or classifications observed, charged or controlled by *any natural gas company,* and in that connection to determine the justness and reasonableness of what the gas company demanded. The Power Commission found that by proceeding against individual companies through the use of the case by case method, it was failing to carry out effectively the Congressional mandate. It chose to meet the problem by a rule-making process by which it would make a determination of what was reasonable and make its determination applicable to the operations of all of the companies operating in a particular area. This the court held it may do under the general terms of the Natural Gas Act.

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[20] 295 U.S. 602, 625 (1935).

[21] Fuchs, *Procedure in Administrative Rule-Making,* 52 Harv. L. Rev. 259, 265 (1938).

[22] Dickinson, *Administrative Justice—The Supremacy of Law,* p. 21 (1927).

[23] United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[24] But cf. Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947).

There are, of course, a number of questions which arise in connection with possible use of rule-making procedures, e.g., whether rules would have retroactive effect;[25] whether they would be "substantive" or "interpretative;"[26] the extent to which a reviewing court will be free to substitute its judgment for that of the Commission.[27] To meet the requirements of due process, a substantive rule would necessarily be founded upon clearly defined standards and the rule itself expressed in such definite terms that persons subject to it would have no doubt about its meaning. But it seems that these are largely questions relating to the ultimate effect of a particular rule or to the allowable scope of judicial review, and it is believed we should not permit such questions to obscure the need for such powers or to weaken our resolution to proceed with an appropriate test of our existing authority.

Selective and prudent use of rule-making proceedings and their foundation upon clearly established standards after investigation may be vastly beneficial, both to the public interest and to concerned businessmen. We can envision a type of proceeding which would probe in depth such broad industry problems and, which, after full observance of the procedural requirements of the Administrative Procedure Act, would terminate with a general rule prohibiting the practice. Examples immediately spring to mind of recurring problems which the Commission has handled on a case-by-case basis in the past but which might more effectively—and economically—have been approached via a substantive rule-making route: The purchasing activities of wholesale buying groups in the automotive parts industry, fictitious pricing and deceptive guaranty practices in the watch industry, deceptive labeling of reprocessed motor oils, misrepresentations of hair restoring remedies, to list a few. If such practices were approached on a quasi-legislative basis, these could be likely advantages:

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[25] Cf. Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936).

[26] Compare Skidmore v. Swift & Co., 323 U.S. 134 (1944), with American Telephone & Telegraph Co. v. U.S., 299 U.S. 232 (1936). See Griswold, *A Summary of the Regulations Problem,* 54 Harv. L. Rev. 398, 411 (1951).

[27] " 'Interpretative' rules—as merely interpretation of statutory provisions—are subject to plenary review, whereas 'substantive rules' involve a maximum of administrative discretion." Senate Committee Print, Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 18 (1946).

1. The problem of equitable treatment among competitors would be simplified. At the conclusion of the whole rule-making proceeding, in which all would have had an opportunity to participate, all members of the industry would be equally informed of the Commission's ruling as to the practice in question.
2. The existence of an authoritative, prohibitory statement by the Commission carrying with it formal, enforceable sanctions with respect to a given practice would have an extremely strong deterrent effect upon the members of the industry.
3. Subsequent quasi-judicial proceedings against recalcitrant members of the industry would be immensely simplified because these proceedings would involve only the factual issue of whether the rule had been violated. The effect of the Act producing the violation would not be an issue in subsequent proceedings.

Such procedures could endow the Commission with a new, far-ranging flexibility. For example, the present case-by-case approach is cumbersome and poorly adapted in many instances to keeping pace with the commercial innovations of a dynamic economy. The regular emergence of new types of distribution outlets, new methods of distribution, new selling devices, and ever-deepening competitive pressures, finds the Commission unable to keep pace by using case-by-case method solely. It may well be argued that the administration of those statutes confided to the Commission's enforcement might be made far more effective in many instances by the use of rule-making procedures than through disjointed, long-drawn out, case-by-case adjudicative process.

Rule-making procedures would be limited to a narrow range of practices which the Commission had reason to believe were in violation of law. In contrast to Trade Practice Conference Rules, the results—after full hearing, and subject to appropriate judicial review—would be conclusive, so far as the issue of lawfulness was concerned. Subsequent adjudicative proceedings could then be instituted against particular respondents charged with violation of the rule, and the rule would carry with it the same sanctions as would the statute itself. Thus, these rule-making proceedings would not be aimed at a generalized restatement of the law as applied to a particular industry or at solving every industry problem in one package, but, rather, would be focused upon critical competitive problems in a particular industry as they arose. In this respect, the results would be more like Internal Revenue Service tax rulings than like our present Trade Practice Rules or Industry Guides.

The use of substantive rule-making proceedings could mean a substantial re-alignment in the Commission's activities. It should be emphasized once again that these recommendations suggest no abatement in the Commission's fundamental adjudicative work; but they do contemplate a strong, new emphasis upon the solution of industry-wide problem areas through rule-making procedures as a supplement to the Commission's present enforcement responsibilities. In fact, it is quite possible that case-by-case application of a prior fixed rule would involve a far narrower, less complicated range of issues than under the present procedures with a consequential increase in the number and effectiveness of the Commission's adjudicative efforts.

This would require more than a re-alignment. It would require also a competent legal and economic staff at the Commission and the sympathetic cooperation of American businessmen as well. They must appreciate the basic fact that effective antitrust enforcement is the most pro-business public policy ever developed by the genius of American democracy. Its sole objective is to insure the preservation of a competitive enterprise system. Too often businessmen miss this point. It is no accident of economic and political history that nations with truly competitive economies have never embraced totalitarian creeds, either of the fascistic or communistic variety.

A vigorous and informed antitrust enforcement program is just as important to businessmen as it is to labor, farmers, and consumers. After all, we are all in the same economic boat, and it is driven by the enterprise system. It then inevitably follows that public officials must have the economic facts necessary to make informed judgments as to how competitive processes may be preserved.

As has been mentioned earlier, the case approach to antitrust problems is not adequate for many of our problems. The great danger of relying solely on this approach is that it strikes only at individual firms and often fails to develop the economic facts necessary to develop adequate remedy. It cannot be emphasized too strongly that we must make reliable economic understanding the cornerstone of any legal edifice constructed to ensure the maintenance of a competitive economy.

The case approach is especially effective when two assumptions are fulfilled: (1) a particular firm (or small group of firms) is violating a law, and (2) the economic and legal remedy is relatively simple.

The most meritorious derivative of the suggested approach to competitive problems is that it directs attention to an entire industry rather than focusing attention solely on particular firms, and it involves an analysis of all relevant aspects of a problem rather than dealing only with symptoms. Moreover, if businessmen cooperate willingly in such undertaking, they may become partners rather than antagonists in the development of sound antitrust policies. This should avoid many of the pitfalls of becoming enmeshed in the interminable legal processes inherent in the case approach. The adversary approach to antitrust problems too often emphasizes conflicts and differences, when what we should strive for is a harmonizing of interests.

THE ADMINISTRATIVE REVOLUTION AT THE FEDERAL POWER COMMISSION

By Harry J. Trainor *

In recent years the Federal Power Commission has been subjected to severe criticisms as to the way it has carried on its work or failed, particularly in the natural gas area. Not all of these criticisms have been justified, but unquestionably the delays in disposing of the natural gas case load and in developing workable policies to implement the regulatory framework in that field have not reflected much credit on the Federal regulatory process. Our problems in natural gas have been so staggering that the President, in a Message to Congress on the Regulatory Agencies singled out the Federal Power Commission's "incredible backlog of cases" to emphasize the adverse effect on the Nation's economy

It would be nice if I could tell you that our electric power work is current, but I cannot. In the electric power work we have a situation which may be as serious as the natural gas work, although the circumstances are different. Our backlog in the electric field is not so much one of pending cases as it is of pending ideas and responsibilities. The flood of natural gas work has overshadowed the electric work and has diverted so much of the Commission' attention and so much of the Commission's funds that the electric power work, which was the main function of the Commission for many years, has suffered severely by attrition.

During the last few months we have been hard at work reviewing the responsibilities and activities of the Commission. We have taken a close look at our policies, our procedures and ou organization.

This has led to some major organizational changes. Perhaps the most important change was in connection with our Bureau o Natural Gas. We had in that Bureau a so-called flat organization with emphasis on functions such as rates, facilities and cost o service. The emphasis now is on staff responsibilities by companies and proceedings. Another key feature is the fixing of more direct lines of responsibility in the Bureau. The new Bureau o Natural Gas organization has three divisions: one will be responsible for all independent producer cases, both rates and certificates

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* Executive Director, Federal Power Commission.

another will be responsible for all natural gas pipeline matters; and the third will handle the planning and control functions of the Bureau. The producer and pipeine divisions are divided into geographic sections with teams of technical personnel within these sections assigned to handle specific proceedings. The planning and control division will be concerned with internal administration, including setting standards and procedures, training, budget planning, scheduling technical work activity, and rule-making proceedings. Another aspect of the reorganization of this Bureau was the setting up of an office at Houston, Texas. This office will serve to provide verification and local operating information to the teams handling filings and proceedings. One of the chief reasons for delay in processing natural gas rate cases has been the length of time taken in staff field investigations of the companies' books. The establishment of the Houston field office is a part of our program to simplify and expedite these rate investigations.

Another important change in our organization involved the Office of Economics. The Division of Economics was upgraded to a separate office reporting to the Commission. This was done to give greater emphasis to the economic aspects of functions performed by the Commission under the Natural Gas and Federal Power Acts. We are recruiting competent economists, and the office soon will take its full place in our scheme of things.

Other changes of a less comprehensive nature involved the Office of General Counsel, the Bureau of Power and the Office of Administration. The natural gas rate functions of the Office of General Counsel were reorganized by establishing two Assistant General Counsel positions—one responsible for independent producer rate matters, and one responsible for pipeline rate matters. The heavy workload in rate matters made this separation necessary.

The responsibilities and functions of the Section of Power Reports were transferred from the Office of Accounting and Finance to the Bureau of Power. Also, the responsibilities and functions with respect to electric rate matters were transferred from the Bureau of Natural Gas to the Bureau of Power. These transfers place all electric power matters in a single office. The Division of Management Assistance was established in the Office of Administration. This Division is responsible for organizational and procedural studies, for the operation of our automatic data processing systems, and for the administration of the Commission's Management Information System.

These organizational changes are aimed at helping to cure the backlog problem and to better carry out our statutory responsibilities. Speaking of statutory responsibilities, the new Commission soon became aware that the Federal Power Commission had not fully carried out its responsibilities under section 202 of the Federal Power Act, which directs the Commission to divide the country into regional districts for the generation, transmission and sale of electric energy. *This section also requires the Commission to promote and encourage interconnections and coordination within and between the districts.*

In recent years the Commission has exercised its responsibility under this section by making detailed studies of interconnections between individual systems and groups of systems. These studies have served a useful purpose by encouraging power pooling and interconnections. Such a study recently was made by the staff which recommended a strengthening of electric utility interconnections in the east coast area of southern Georgia and northern Florida to make possible larger movements of electric power than is now feasible with present facilities.

The Commission now sees the need to make a survey to develop a long-range, coordinated, national plan dealing with electric power requirements over the next 20 years and the orderly means of meeting those requirements, with a view to maximum economy and efficiency of the overall power supply of the nation. This survey will serve as a guide for the electric utility industry in its construction of new generating capacity and transmission facilities. It will promote and encourage the expansion and the interconnection and coordination of electric utility systems and also focus attention on the proper utilization and conservation of natural resources, including water power as well as coal, oil, and natural gas. The survey will give consideration to such important matters as new sources of power supply, air pollution and national defense.

In recent years there have been major technological advancements with respect to the size and efficiency of generating units. The development of extra high voltage transmission lines makes it feasible to plan for a system of power supply which would bring the benefits of these highly efficient units to the entire country by 1980.

By 1980, electric power use is estimated to be 3¾ times the 1960 requirements. During the next 20 years it is estimated tha it will be necessary to install 400 million kilowatts of additional electric generating capacity—twice the total now in operation. This capacity and the associated transmission lines will represent an investment in the order of 80 to 100 billion dollars. Whether this expenditure is made in accordance with a national plan and for national benefit or is comprised of projects planned for individual companies or limited areas with no, or with inadequate, transmission interconnections, will make a great deal of difference to the economic well-being of our country in time of peace, and to its security in time of war.

The Federal Power Commission's proposed survey will go beyond the detailed plans of individual utility systems and area pools by taking a long-range look at all of the nation's power resources, and relating them to the enormous future demands for electricity. Specifically, the study will develop the extent of the need for additional power supply in 1970, 1975, and 1980; and means of providing additional power supply would be explored with the purpose of determining appropriate location and size of new plants, taking into consideration construction costs, fuel costs, loads, diversity, and other factors. This analysis, together with a suggested over-riding high-voltage transmission system, would constitute a nation-wide plan providing a framework within which regional and system development could proceed.

The Federal Power Commission survey report will serve as a guide and a goal for the nation's 3,600 electric systems in keying their future expansion plans to a national scale rather than to a local or regional basis. Private, municipal, cooperative, state and federal electric systems would coordinate their facilities over wide regions, through the extra high-voltage transmission lines, using not only conventional steam and hydroelectric generating capacity, but other new sources as they become available.

President Kennedy recently emphasized the significance of our power survey in his message to the Congress of the United States on National Resources. He said:

> One of the major challenges in resource conservation lies in the orderly development and efficient utilization of energy resources to meet the Nation's electric power needs—needs which double every decade. The goal of this administration is to ensure an abundance of low-cost power for all consumers—urban and rural, industrial and domestic. To achieve this, we must use more effectively all sources of fuel, find cheaper ways to harness nuclear

> energy, develop our hydroelectric potential, utilize presently unused heat produced by nature or as a byproduct of industria processes, and even capture the energy of the tides where feasible
>
> The ability to make long-range plans for the expansion of ou Nation's electric power supply required by constantly growin power needs will be enhanced by a comprehensive nationwid survey to be undertaken by the Federal Power Commission. Unde existing authority contained in the Federal Power Act, the Commission will project our national power needs for the 1970's an 1980's and suggest the broad outline of a fully interconnecte system of power supply for the entire country. This informatio will encourage the electric power industry—both private an public—to develop individual expansion programs and interti systems permitting all elements of the industry—and more importantly the consumers—to benefit from efficient, orderly planne growth. I urge favorable action on the request for adequate fund to initiate this study of the Nation's power needs for the next 2 years.

I would now like to discuss the different types of natural ga proceedings which are pending before the Commission in on form or another, and which compose our backlogs. These ma be divided into two types: certificate of public convenienc and necessity applications (independent producer and pipelin transmission companies), and rate proceedings (producers an pipelines.)

The problems surrounding the issuance of certificates of publi convenience and necessity are not insurmountable. We eventually dispose of certificate proceedings through shortened procedure or by formal hearings, but not within ideal time limit We are doing all we can to shorten the processing and hearin time to a reasonable standard. Improved procedures and additional personnel is what is needed.

The rate proceedings represent a greater problem. We ar close to solving the pipeline rate case problem. But the independent producer rate problem cannot be solved in the nea future. I am sorry to say, my view is that it will require a lon time. We plan to dispose of most of our producer cases by mean of Area Rate Hearings.

While the idea of area natural gas rate hearings was advance some time ago, the present Commission reviewed the plan o area rate proceedings and decided that they afforded the mos promising administrative vehicle for getting the work done. Th

Commission has instituted area cases in two of the most important producing areas, the Permian Basin and Southern Louisiana. The Permian Basin proceeding in west Texas and the southeastern part of New Mexico, is well underway. The Southern Louisiana proceeding, while not nearly as far along as Permian, is progressing and the pre-hearing conferences have been concluded. As a result of the study of the pre-hearing conferences, the Commission has amended its Policy Statement to announce new ceiling prices for initial sales in that area. Producers now know that all of the new initial price is theirs to keep, and consumers will no longer have to pay out-of-line prices for new gas in the hope that at some future date they may be refunded, in part. It is the Commission's hope that this new level will afford a basis for disposing, by settlement, of a large part of the backlog of certificate cases involving Southern Louisiana gas.

The carrying forward of area hearings presents many new problems embracing as they do hundreds of producers as respondents, some of whom have special problems. However, everyone has cooperated and we have every reason to hope that our goal will be reached.

What has happened in the pipeline rate proceedings? We have received a real break in that we have had only a few pipeline rate increases in the last two years—only eight this year. We would have received a hundred if prior rate of acceleration had continued.

Our pipeline rate case backlog has been reduced by the Commission's policy of encouraging settlements in pending cases. Last November Chairman Swidler announced that the Federal Power Commission was undertaking an over-all program to encourage settlements of pending cases as one of the most useful tools for bringing our work to a current status. This program has already contributed significantly to this goal. In the short time since we began to push settlements, the Commission has approved settlements in 26 rate cases, involving approximately 112 million dollars per year in proposed increases. These settlements resulted in reducing the rate increases requested by well over 40 percent annually, and in refunds of nearly 80 million dollars to distributors serving consumers in the south, southwest, midwest and east. *The Commission, in approving these settlements, is adhering to the standard that the results must be consistent with what reasonably could be expected through litigation.* The benefits to the public, and companies, and the Federal Government are considerable.

Besides our efforts to settle and to otherwise dispose of all of our pipeline rate cases, we are making definite plans to see that we won't ever again have the situation of rate increases "stacked" on top of rate increases.

Last year the American Gas Association issued a report of The Special Committee of Executives on Regulatory Affairs. This report set forth the findings and recommendations in a section titled "Reform of Field Audits," which concerned the delays in processing important gas industry matters before the Federal Power Commission. The report recommended: (1) that the Commission determine the necessity for and the scope of a field audit by a critical analysis of pertinent company data already in its possession as well as data currently received from the company, (2) that when staff audits are determined to be necessary, they be confined to items which are substantial and significant, and (3) that we establish under the Chief Accountant a small corps of roving auditors to periodically review the company's records to assure that they are being maintained in accordance with the F.P.C. Uniform System of Accounts.

Some of the pipeline companies suggested that a major portion of the Commission workload could be eliminated or the time of the field audit shortened, if we would amend our rules to require applicants for rate increases to submit, with their applications, audited statements covering the test period and certified by a recognized, independent auditing firm, instead of relying on the lengthy field audit now undertaken by the staff.

The need to expedite our rate cases is emphasized by legislation proposed by the NARUC and others, the so-called "pancaking" bills. These generally would prevent successive rate increases from becoming effective before the lawfulness of a pending increase has been determined by the Commission.

A prime step in our new approach is the proposed revision of Section 154.63 of the Regulations Under the Natural Gas Act which is the subject of a current rule-making proceeding. The proposed revised regulations require an opinion from independent public accountants which would be an independent expression of the results of their review. This requirement has been suggested to us by many persons, mostly from industry, and we have carefully considered it. At first we were not sure whether this could properly be done. We were concerned also as to whether the opinion should be optional or should be required, but we concluded that we should require the auditing opinion in the interest of expedition and uniformity in processing the pipeline rate cases. We discussed with partners of several accounting firms that regularly audit pipeline companies, the advisability of including in our regulations the auditing requirement, including the opinion. We agreed that this would be a real contributing factor toward expediting cases, and that it would serve as a substitute for some of the work now being done by our field staff. The auditing firms were cautious until they were sure that their audits would play an essential part in the program. They were assured that we didn't expect any opinion on controversial rate-making questions, and that their opinion would only be on the adequacy and accuracy of the representations made by company officials with respect to the authenticity of report "per book" amounts.

As soon as a filing, with the independent auditor's opinion, is received, we plan to start a preliminary office review to be completed within the thirty-day statutory period in which the Commission must decide whether the increase should be suspended. Also during this period, the Commission must decide if it will accept or reject the filing. Or it may request additional information. If a suspension is ordered by the Commission, our staff will decide how much, if any, field work is required. Whatever field work is necessary will be programmed in advance, and generally will be directed to the more important items, usually those involving rate-making philosophy and which may have a substantial effect on rate levels. All interested parties have been notified and will have a chance to comment, making known their views.

We hope these new procedures will prevent further backlogs in pipeline rate cases and permit us to do a much better job of natural gas rate regulation. Earlier, I referred to our Management Information System, which was inaugurated by Chairman Swidler to help eliminate backlogs. The objective is that the bureau and office chiefs compare current workload and accomplishments with projections, observe trends and critical areas, control the assignment and flow of the work, check performance, and establish new goals and budget programs. The system comprises charts and Produc-Trol boards located in the Commission meeting room. The charts are included in management books retained at the desks of the chief executives.

The charts are of three types—first, those showing the nature, extent and trend in growth of the industries regulated by the Commission; second, certain administrative charts, including organization, budget, staffing, legislation, and litigation; and third, some fifty charts showing the trend in selected Commission workload over the years—workload received, processed, and remaining on hand during the current fiscal year, and a comparison of current experience with projections. The tabulations which support certain workload charts summarize and show the current status and age of individual cases. The management information books, charts, and Produc-Trol boards are maintained current at the end of each month or quarter, and are used as the basis for briefing sessions aimed at reducing backlogs, improving procedures, and increasing the effectiveness with which the Commission carries out its regulatory functions.

The new Commission under Chairman Swidler submitted to Congress the most comprehensive legislative program in the history of the Commission. Hearings have already been held on the recommendation requesting jurisdiction over direct sales of natural gas in interstate commerce for industrial use. Another recommendation is the one requesting authority to extend the length of suspension of proposed gas rate increases—at the discretion of the Commission in specific cases—for an additional six months beyond the five months now allowed. One of our recommendations would amend the Natural Gas Act to give the Commission broad powers to conduct investigations and collect information covering the entire natural gas industry, instead of only for jurisdictional companies. The F.P.C. now has comprehensive investigatory authority over the electric power industry, but does not have complete authority to secure information on all segments of the natural gas industry.

Other proposed Natural Gas Act amendments would give the Commission authority to suspend pipeline rate increases for sales for resale for industrial use only; to eliminate the mandatory hearing requirement on gas certificate applications and on abandonments of gas facilities or service; to direct pipeline companies to interconnect facilities for the sale and exchange of natural gas in limited circumstances; to prescribe safety regulations for interstate pipelines; to regulate security issues of pipeline companies; to assert broader jurisdiction over the import and export of natural gas; and to regulate pipeline companies' transfers of gas reserves which have constituted a part of the basis for the issuance of certificates.

Under electric power industry regulation, Congress was asked to prescribe standards for the F.P.C. to follow in making recommendations for future ownership and operation of hydroelectric projects following expiration of license periods. The Federal Power Act now provides to the United States the right to take over, maintain, and operate hydroelectric projects upon expiration of F.P.C. licenses, normally issued for 50-year periods. The proposed amendment would direct the F.P.C., prior to expiration of licenses, to make studies and investigations and prepare recommendations on future ownership and operation. This problem is becoming increasingly important because some of the early licenses will expire commencing in 1970.

Our proposed legislative program would amend the Federal Power Act to authorize the F.P.C. to exempt more small hydroelectric projects from certain licensing provisions by changing the statutory exemption limitation from 100 to 2,000 horsepower. The Commission also asked Congress to repeal the provisions which now permit nonjurisdictional companies, with F.P.C. approval, to make permanent connections of facilities in interstate commerce for emergency use without becoming subject to F.P.C. jurisdiction.

The other proposed amendments to the Federal Power Act would require approval for abandonment or curtailment of interstate electric power facilities or service; give the Commission authority to direct interconnections of electric facilities in certain circumstances not only upon application, as now provided, but also on the F.P.C.'s own motion; broaden existing F.P.C. authority over the import and export of electric energy; and repeal the requirement that licensed project cost statements and copies of licenses be filed with the Secretary of the Treasury and the General Accounting Office, respectively.

In addition, the Commission proposed an amendment to both the Natural Gas and Power Acts which would give it authority to delegate, with certain exceptions, to one or more Commissioners or subordinates any portion of its work, business, or functions now requiring Commission action.

Both the Federal Power Act and the Natural Gas Act provide for cooperative procedures between the Federal Power Commission and state commissions. Under these and other provisions of the Acts, this Commission is particularly interested in state commission activities relating to the conservation, production, transmission and distribution of natural gas, and the generation and transmission of electric power. The Commission intends to make a greater effort toward valuable and constructive cooperation with state public service commissions.

ESSAYS ON ETHICS IN ADMINISTRATIVE REGULATION

"HIGHER LAW" AND HIGHER ETHICS

By BROOKE WUNNICKE *

"Droit Administratif is a term known under one form or another to the law of most continental states, but it is one for which English legal phraseology supplies no proper equivalent. The words 'administrative law,' which are the most natural rendering of droit administratif, are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.

"This absence from our language of any satisfactory equivalent for the term droit administratif is significant: the want of a name arises at bottom from our non-recognition of the thing itself.

"In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown."[1]

These words, which read so strangely in 1962, were written by the eminent juristic author, A. V. Dicey, in the year 1885. Less than sixty years later, a mere fragment of time in the history of the law, a United States District Judge averred: "The authority of the judiciary and the place of judge-made law seems to have undergone a sharp and decisive decline. This is not to level a charge against any judge or group of judges, but to say that today the role of judge-made law is distinctly secondary."[2] This same conclusion was repeated subsequently by Mr. Justice Jackson, who declared in an official court opinion that: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."[3]

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[1] Dicey, *Law of the Constitution* (1885).

[2] Judge Charles E. Wyzanski, The Trend of the Law and Its Impact on Legal Education, 57 Harv. L. Rev. 558, 560 (1944).

[3] FTC v. Ruberoid Co., 343 U.S. 470, 487, 72 S. Ct. 800, 810, 96 L. Ed. 1081 (1952).

The total number of administrative decisions rendered within a single year in the United States by all Federal, state and municipal administrative agencies would represent so many agencies as to defy accurate compilation; and, if compilation were even possible, the total number would be so great as to defy comprehension of its significance.

The following extracts, selected from an authoritative text on administrative law, give striking proof of the quantitative impact of administrative adjudications upon our American society:

> "For instance, during one year 1,664 cases were docketed in the Supreme Court of the United States, and the number of written opinions of the Court was 82, filling 1,165 pages. During the same year, the NLRB received a total of 13,388 cases of all types, and the number of written opinions of the Board was 747, filling 4,791 pages." [4]
>
> "The Internal Revenue Service received more than 90,000,000 tax returns in one year. . . . A total of 37,504 tax rulings were made. . . . Tax fraud cases investigated were 4,650." [5]
>
> "One of the nine units of the Department of Health, Education, and Welfare is the Social Security Administration, in which one of four units is the Bureau of Old Age and Survivors Insurance. The Bureau handles about two million claims annually." [6]
>
> "Out of the millions of claims presented by the twenty-two million veterans, appeals were taken during one year to the Board of Veterans Appeals in 54,791 appellate actions. During the year, 15,158 hearings were disposed of by the Board of Veterans Appeals." [7]

One portion only of the given statistics which relate to the Interstate Commerce Commission reveals:

> "The Bureau of Formal Cases of the ICC conducted hearings and prepared proposed reports in 490 cases, and the total cases disposed of by this Bureau were 1,583. Informal rate cases disposed of were 1,742, in addition to 1,355 special-docket applications. The ICC received 3,365 applications for common-carrier certificates, contract-carrier certificates, contract-carrier permits, and brokers' licenses; 2,033 hearings were held on these applications, and in the cases heard, 269,264 pages of transcript were taken." [8]

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[4] Kenneth Culp Davis, *Administrative Law Treatise,* vol. 1, p. 9.

[5] *Ibid.,* p. 10.

[6] *Ibid.,* n. 4, p. 10.

[7] *Ibid.,* n. 4, p. 10.

[8] *Ibid.,* n. 4, p. 11.

The author of the treatise from which the foregoing quotations were excerpted properly cautions that the many types of "cases" filed with diverse administrative agencies and the "trials" held thereon are incommensurable with civil cases tried in the Federal District Courts. However, even when this factor of incommensurability is taken into consideration, the present volume of administrative adjudications supports the validity of this syllogism:

> A just state is necessary to secure the rights of individual citizens;
>
> Ethical procedures in the judicial process are prerequisite to justice;
>
> Administrative adjudications judge and determine the rights of citizens;
>
> Therefore, in order to secure the rights of individual citizens, ethical procedures must be inherently guaranteed in the adjudicative process of administrative agencies.

Acceptance of the foregoing premises and conclusion renders inescapable the inquiry as to solution: What principles and provisions should be incorporated in a code of ethics for administrative agencies, and in what manner should the code be implemented? The quantity and scope of administrative adjudications is so pervasive in effect upon the citizens of the United States that an adequate code of ethics for the administrative agencies is imminently necessary. In this reference, the requirement of "adequacy" can only be fulfilled by a courageous and vigorous statement of principles. It is further recommended that such a code should not be diluted to include regulation of the rule-making powers of administrative agencies, but rather should be confined to regulating the adjudication process. Why? To extend a code of ethics to both the rule-making power and to the adjudicating power would be to fall into the very pitfall that has given rise to present evils: the blind toleration of the blending of the executive, legislative and judicial processes. The power to judge—the essence of the judicial function—should not and cannot be subjected to the same ethical standards as the power to initiate rules to be obeyed. This is neither a specious nor technical distinction; there are admittedly not greater and lesser ethics; but the ethics of justice are more exacting. Exclusive of moral law, law-making is entirely man-made—the enactment of statutes and the administrative issuance of regulations for the purpose of establishing rules of daily conduct. The process of judging, culminating in judicial decree or administrative adjudication can never be severed from that noblest abstract concept of justice. Whether it be a judicial decree in a major civil suit or whether it be a contested rate matter before an administrative tribunal, the problem, process, and result are all the same: the dispute should be judged and resolved according to the indefinable standards of fairness and justice. No code can define fairness and justice, but a code can enunciate those principles of behaviour which centuries of Anglo-American judicial experience have taught will best serve to promote justice.

At this juncture, it would be helpful to take a cursory look at the history of the growth of administrative law as a social organism apparently distinct from all other law. Of compelling interest to this writer was the following historical comment:

> "The American Bar Association had fought for the propositions that 'the decision of controversies must be brought back into the judicial system,' that 'life tenure should be assured to all who are to exercise judicial functions,' that 'administrative absolutism' stems from Marxism, and that the administrative process should be crippled through the Walter-Logan measure; but the Association was apparently reasonably satisfied with the APA (Administrative Procedure Act), even though it transferred no power back to the courts, did not substantially increase judicial review, continued the system of adjudication by those enjoying no life tenure, improved the administrative process instead of weakening or crippling it, and in general gave assurance that further efforts to cripple the power of the agencies would be unlikely to succeed. The battle over fundamentals had ceased. The federal administrative process seemed secure." [9]

It is conceded that the battle over the fundamental issue of whether or not administrative law would be accepted in this country is now over. As a member of the legal profession and of the American Bar Association, this writer reminds the reader that the battle over the fundamentals of a fair judging process can never be over, but must be continually and vigilantly fought against the inherently corrupting influence of power upon individuals invested with power. It is further submitted that the oft-voiced argument that our increasingly complex society demands streamlined methods of adjudging controversies becomes a shoddy and hollow pretext at that given instant when it deviates from an ethical administration of justice. Since the mists of human history first cleared, the people of this world have repeatedly witnessed the moral wrongness of and the tragic consequences attendant upon obedience to the familiar aphorism: "The end justifies the means." Expedience is not a false value; it is not a value at all. Yet all too often has expediency been a guidepost in the development of administrative law.

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[9] *Ibid.,* f.n. 4, *supra,* p. 30; footnotes cited omitted.

The foregoing comments are not proffered in support of the thesis that there is a need for a code of ethics for administrative agencies; that need exists ipso facto for any individual, agency or tribunal which has the power to adjudge disputes and to determine the rights of individuals. Rather, the purpose of the comments is to emphasize and to justify the need for a code of ethics which is a modern declaration of the Magna Charta—a Nova Charta—to insure for our citizens a system of justice in every field of the law which is consonant with the highest ethical principles.

Lord Beaconsfield in his renowned Maxims declared: "Knowledge is not a mere collection of words; and it is a delusion to suppose that thought can be obtained by the aid of any other intellect than our own. . . . When a man is not speaking, or writing, from his own mind, he is as insipid company as a looking-glass." This quotation serves as a caveat to the reader that this writer's suggestions for a code of ethics for administrative agencies, whether worthy or worthless, are original. Pedantry is always distasteful; compiled knowledge is always helpful; but solutions to new problems can no more be solved by iteration of accumulated data than by "collection of words." Let us not permit the sought-after code of ethics for administrative agencies to be a re-statement of small rules nor framed in the language of administrative regulations. The caution as to language is not facetious, because concomitant to the growth of administrative law has been the evolution of an administrative language, originally unique to its own field, but which is rapidly coming into common usage. For example, in discussing the matter of a code for administrative agencies, the writer is concerned with how the code shall be "implemented"—this respectable transitive verb becomes translated in administrative law into "implementation," a word form which it is submitted is of dubious pedigree. The proposed code demands bold language to encompass the great principles of justice which our present society has derived from the experience of past societies. Let there be agreement upon principles; let these principles be harmonious with the basic ideals and with the basic documents of our constitutional republic; and let these principles be expressed in clear and unequivocal language. Clarity of style is of no light moment in expressing the guiding principles for protection of the rights of individuals, and the authors of the Declaration of Independence and of the Constitution of the United States gave careful heed to the importance of word usage and style. Thus, careful word usage is urged as the first recommendation to be incorporated into the proposed code of ethics. The writer avers that this recommendation is appropriate, for is not law itself divided into two parts: procedural law and substantive law? To ignore one is to impair the other.

The principles which should be incorporated in the proposed code of ethics for administrative agencies should be expository of the basic theories underlying the American tradition of jurisprudence. The current sovereignty of the pragmatic approach to publice problems should not be permitted to dominate exclusively the contents of the code, for as the late Justice O. W. Holmes, Jr. wisely stated: "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house." [10] Expression of the American theory of jurisprudence is vitally important in the code, because a review of administrative adjudications and the trend exemplified therein indicates a tendency to adhere to the Hobbesian theory of government: all rights stem from government, and any rights which an individual may have are merely implements of public policy. This essay is in no way intended as a philippic against administrative agencies, but as an objective appraisal of the apparent bent of admnistrative law, in the absence of a guiding code of principles. However, the Constitution of the United States is predicated on the theories of Locke, rather than of Hobbes. This is no re-statement of schoolbook history, but is of tangible pertinence: Locke expounded the theory that a government created no rights, but serves as a fiduciary of the rights of the people. This is the basic ethical foundation of our American government, and the work of the present vast array of administrative agencies will become more and more alien to American principles of justice until and unless by a code of principles they are brought into a harmonious alignment.

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[10] Holmes, *Collected Legal Papers* (1921) p. 200.

These American principles of justice, and justice cannot be divorced from ethics, are nowhere more cogently stated than in the short classic, *The 'Higher Law' Background of American Constitutional Law,* by Edward S. Corwin, from which the following excerpts are quoted:

"Locke foreshadows some of the most fundamental propositions of American constitutional law: Law must be general; it must afford equal protection to all; it may not validly operate retroactively; it must be enforced through the courts—legislative power does not include judicial power."

And his concluding passage in this famous essay also bears re-reading:

"Why, then, did not legislative sovereignty finally establish itself in our constitutional system? To answer at this point solely in terms of institutions, the reason is twofold. In the first place, in the American written Constitution, higher law at last attained a form which made possible the attribution to it of an enirely new sort of validity, the validity of a statute emanating from the sovereign people. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a sovereign law-making body which is subordinate to another law-making body. But in the second place, even statutory form could hardly have saved the higher law as a recourse for individuals had it not been backed up by judicial review. Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian."

This passage is far more than an enunciation of the separation of powers doctrine, which has been rather effectively eroded by administrative law; its significance is more far-reaching. The foregoing quotation underscores a basic difficulty in the present adjudicating procedures of our administrative agencies which also have rule-making power: such agencies are giving effect to legislative sovereignty without judicial review—and this merger inescapably abrogates "the higher law" and upsets the ethical sensibilities of the people. It is not a question of intent nor competency of the personnel of the administrative agencies; it is a basic incongruity in the administrative pattern.

Thus is developed the second recommendation for inclusion in the code for administrative agencies: a statement of the principle that promulgated rules must be general in application; must afford equal protection to all; and the persons who promulgate the rules shall not be the same persons who enforce the rules nor shall such persons be the ones who apply the adjudicative process. The number of personnel employed in agencies with the rule-making powers is sufficient for such a proposal to be economically feasible, and such a principle is prerequisite to ethical administration. The picture of a single person serving as policeman, prosecutor and judge has traditionally been repugnant to the American people; and whatever, by way of statute or decision, has served to blur or conceal this picture should not be tolerated nor timidly dismissed as an irreversible trend. In continental countries which have had a long inheritance of administrative law from Roman jurisprudence, there have developed administrative courts to protect the citizens from the arbitrary exercise of administrative power. It is submitted that ethical practices can be better ensured in this country by conforming administrative procedure to the philosophy of the higher law which underlies our Constitution.

Certainly emphasis may be deservedly placed on the principle that the law or rule shall be general in its application to those governed by it. For example, the same rule of law can be forced to be re-litigated in each of our Circuit Courts should the Commissioner of Internal Revenue elect to non-acquiesce in the judicial interpretations. It is freely admitted that it is currently out-of-fashion to be concerned with "higher law" and the idealism of American jurisprudence; and through apathy and careless disregard, there has developed an alarming degree of acceptance that for the sake of efficiency, expediency must govern. This doctrine is both ephemeral and illusory, because efficiency is a means and not an end. Mere efficiency can never be more than a handmaiden to justice; it must never dictate to justice.

A third recommendation for inclusion in the proposed code for administrative agencies is an adaptation of Canon Three of the Professional Ethics, which is entitled "Attempts to exert personal influence on the court." Surely we must require no lesser standard for objective adjudication by administrative officers than is required of our judicial officers in the court systems. The Canon reads as follows:

"Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate; or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor."

An effective code will contain many provisions, but the foregoing three are the basic essentials for adequacy in the opinion of this writer: clarity of language; enunciation of basic applicable principles of American jurisprudence; and application of the same standards for administrative adjudicators in their relationships with counsel as is now required for judges.

Two suggestions are made for the effective implementing of a code for administrative agencies such as has been discussed in this paper. First, its enforcement will be enhanced if it is adequate and representative of the ethical problems which have developed in administrative adjudications throughout the country. Hence, it is recommended that the American Bar Association initiate a program whereby a Code Committee will be established in each state, and the results of their respective studies and the compilation of their recommendation be embraced in a final code. Second, the only proper institution under our form of government to enforce the provisions of such a code is the judiciary. Any alleged breach of the provisions governing the ethical practices of administrative agencies should be triable and tried by our courts of law.

In conclusion, the writer is well aware that this paper contains much that is controversial in this year 1962, but it is contended that there has been no change in the tenet first uttered by Aristotle: "An unjust law is not a law." The Bench and Bar of the United States, blessed with a noble tradition of jurisprudence and a history of courageous effort on behalf of justice, faces a complex and genuine challenge from the relatively new field of administrative law. Let us not be content with a narrow code of rules; let us draft, secure acceptance of, and ensure enforcement of a truly adequate code of ethics for administrative agencies.

ACHIEVING IMPARTIAL DECISION BY QUALIFIED PERSONNEL IN ADMINISTRATIVE AGENCIES: AN ALTERNATIVE SUGGESTION

By THOMAS ALBERT GILLIAM *

This is an ancient problem. Aristotle considered it in his *Ethics*.[1] Machiavelli, with Latin pragmaticism, developed it, although perhaps not in the interests of impartiality.[2] The English considered solution essential to world government, and the American reformer dramatized it in the cities of the new world.[3] And the reformer, although derisively portrayed as a high hatted bluenose with feet of clay, has, perhaps, an historical role. For his time in American public life was probably as natural as was the Jacksonian era, which presaged in politics the frontier, and the theme that to the victor belonged the spoils.

Urbanely, the subject is now called "Conflict of Interest," a matter of investigation by Congressional committees.[4] A new generation of newsmen, whose wilder forebears ridiculed the reformer, now display an interest.[5] The subject has become almost non-partisan, since both Truman and Eisenhower administrations [6] discovered that there are some in the Government who not only display a red tape proclivity but conceal a sticky finger avidity. Because of this, the whole administrative process is being subject to review,[7] with a search for an effective means whereby to eliminate *ex parte* communications, common venality, and the more subtle influences with respect to governmental decisions.[8] Various groups, including a special committee of the Association of the Bar of the City of New York are involved in this matter of conflicting interest.[9]

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[1] Aristotle, *Ethics* (Dutton 1950).

[2] Machiavelli, *The Prince* (Great Books of the Western World 1952).

[3] Steffens, *The Shame of the Cities* (1904).

[4] *E.g. Hearings Before Subcommittee No. 5 on Federal Conflict of Interest Legislation of the House Committee on the Judiciary*. 86th Cong., 2nd Sess. (1960), the subcommittee headed by Rep. Emanuel Celler of N. Y. and hereafter referred to as "Celler Comm."; *Hearings Before the Subcommittee for Special Investigations on the Employment of Retired Military and Civilian Personnel by Defense Industries of the House Committee on the Armed Services*, 86th Cong. 2nd Sess. (1959), the subcommittee headed by Representative F. Edward He'bert of Louisiana, and hereinafter referred to as the He'bert Comm.

[5] Bolles, *How to Get Rich in Washington* (1952); Pearson and Anderson, *U.S.A., Second Class Power?*, Ch. on "Profits Versus Patriotism" (1958).

[6] In Douglas, *Ethics in Government* 1-10 (1952) are listed several Congressional investigations in the Truman era, which a Special Committee of the Association of the Bar of New York City, *Conflict of Interest and Federal Service* (1960), hereinafter referred to as "Report," carries forward in its chapter on "The Role of Congress," at 95-130.

[7] Subcomm. on Administrative Practice and Procedure of Sen. Comm. on the Judiciary, *Report on Regulatory Agencies to the President-Elect*, 86th Cong. 2nd Sess. (Comm. Print 1960).

Efforts to legislate morality into the Government framework, of course, must be made. While there exists a tendency to look back to the golden days of the Athenian Democracy and the brave days of the American Revolution, as examples of impeccable leadership without legislation, there were, no doubt, barbarians and Indians lurking about even then. One essayist has called this nostalgia for golden days, the "pathos of distance." [10] Moreover, these examples are found in the earliest infancy of those republics, and may only illustrate naïvete! And the New York City Bar Association Committee indicates that the present resurgence of interest in honesty is a sign of maturity.[11] This is upon the ground that the savageries of adolescence are put by, and that there is occurring, in mid-life, sober reflection.

In this view, reference may be made to the English experience. As America has inherited law from the mother country, so, perhaps, from her a lesson in morality may be gained. In the Nineteenth Century, the sun never set on the Union Jack. The English civil servant became like a young Atlas. His prestige was as boundless as the world he served. Contrast that of his counterpart in America. One day in the latter half of the Nineteenth Century, discussion arose in the United States Senate as to the status of the American governmental employee. In its course, a Senator observed, apparently without dissent, that a position in the Government was a "demeaning one." He felt that if one could "gain a more independent livelihood" by the use of the knowledge which he acquired in such employ, "one person at least would be saved from its pernicious influence." [12]

This was anti-governmental philosophy of an America with a frontier of the kind it had. The frontier has passed but its philosophy lingers. Roscoe Pound, as a young professor at Nebraska, and as an angry young man, shocked the American Bar in convention in 1906 by telling these lawyers assembled that frontier notions were interfering with America's coming of age.[13] And the unfortunate thing is, there has been little progress since then. Thus even Senator Paul Douglas of Illinois, while an acute observer of the American political scene, lapses in use of the poisonous word, "bureaucracy." [14] There is, it is authoritatively stated,[15] new national challenge. If so, new principle is, perhaps, needed for new responsibility.

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[8] *Id.* at 13-15.

[9] Report, *op. cit. supra* note 6.

[10] Douglas, *op. cit. supra* note 6, at 11.

[11] Report, *op. cit. supra* note 6, at 5-6. Compare Bolles, *op. cit. supra* note 5, at 3: "When nations mature, they grow tolerant of evil."

[12] Senator Sprague of Rhode Island, Report, *op. cit. supra* note 6, at 47.

Professor George Graham has urged, on the other hand, that an unchanging principle in governmental ethics is that issues should be decided upon their merits.[16] He cites, in support of this, an injunction of Moses: "neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous." [17] Out of thirty-five Canons of Judicial Ethics,[18] the only effective governmental code evolved to date, seventeen, he observes [19] bear directly on a judge's duty to act on the merits and to avoid situations or actions which tend to weaken objectivity. Thirteen others are concerned with the efficient rational conduct of business; and five list general obligations to public interest. Administrators, he points out,[20] acting without a code, have, in many instances, a broader discretion than do judges. The latters' moral problem is, moreover, simplified in that they have great prestige and isolation and do not have to take the initiative.[21] Governmental administrators, by way of contrast, are involved "in the field of sales promotions and public realtions were gratuities and other favors are extended or exchanged as a common practice." [22] The little foxes, he concludes, may spoil the vines.[23]

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[13] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 Am. L. Rev. 729 (1906).

[14] Douglas, *op. cit. supra* note 6, at 28. "They are 'bureaucrats' accused of twisting the law to their own ends, and charged at the same time with apathy and excessive zeal," Graham, *Morality in American Politics* 76 (1952).

[15] Kennedy, *Inaugural Address*, U.S. Code Cong. & Ad. News, No. 2, Jan. 19-20, 1961, at 9.

[16] Graham, *op. cit. supra* note 14, at 190.

[17] *Id.* at 190-191. Deuteronomy 16: 18-19.

[18] American Bar Association, *Code of Judicial Ethics* (1958).

[19] Graham, *op. cit. supra* note 14, at 191.

[20] *Id.* at 193.

[21] *Id.* at 193-194. Graham feels that administration is essentially active, and not to act, but to leave the initiative to others in imitation of the judicial process, is to betray a public trust, *ibid.*

[22] *Id.* at 218.

[23] *Ibid.*

Corrupting the administrative process, then, is a great potential and a consequent suspicion of partiality whenever decision is adverse to party litigants. Intolerable to the judicial process, there is even a certain sophistication about this. The idea is prevalent that, in this area, it is difficult to legislate ethics.[24] It has even been said that "if it is a bribe it is too little, and if it is a gift it is too much—rather, if it is a gift it is too much, and if it is a bribe it is not enough." [25] Sophistication, however, seems scarcely appropriate for new endeavor. For this there must be not only honesty in fact, but also even the suspicion of impropriety must be avoided. The New York City Bar Association, accordingly, has suggested a modern approach. It is that while there must be no question as to the propriety of official action,[26] the Government must be in a position to obtain the personnel and information it needs to meet the demands of the Twentieth Century.[27] The Association's Special Committee was of the view that these themes are coequal, and that neither may be safely subordinated to the other.[28] Thus principles grow: there must be honesty in fact but also that of appearance. And there must be adequate personnel and information for contemporary tasks.

Are such ideals impossible of attainment? The very best talent in any society, economic or otherwise, would seem to be in a position to demand the greatest rewards that society could give them. And yet this is not always the case. The ministry and the teaching profession, and that of law and medicine, have drawn extraordinary persons, whose aims are not those of income solely. What sustains them? The idea of service, certainly, an interest beyond one's self, family, and friends. So the several principles seem to be drawn into one again. To decide on the merits, to be honest in fact and appearance, and to have the competency to do these things—all seem incorporated in the central principle of service. And in the civil servant's case, this is a service to a large clientele indeed.

Opposed to these several ideals are several opposite themes.

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[24] He'bert Comm., *op. cit. supra* note 4, at 17.

[25] *Id.* at 101.

[26] Report, *op. cit. supra* note 6, at 3.

[27] *Ibid.* Several policy considerations govern these themes. Added to the equal treatment of equal claims and the necessity of public confidence, are the similar objectives of preventing the use of public office for private gain and preserving the integrity of government policy-making institutions. A fifth consideration is government efficiency, *id.* at 6-7.

[28] *Id.* at 3.

They can, perhaps, be described as individualistic, mechanistic, and legalistic. The American frontier produced a highly individualistic philosophy which lingers as a mute antithesis to government. Such emphasis on individual freedom, as against the necessity of authority, has, of course, resulted in a dynamism upon which the young democracy thrived. It is possible, however, that in the Nineteenth Century this individualistic theme was canonized, overmuch. In an eclecticism, there evolved a mechanistic theory that each looking out for his own would somehow vindicate public rights.[29] "The pulling and hauling of individuals and groups for advantage leads inevitably to equilibrium" [30] has been another expression of this idea. Government, in this view, is an automatic thing, with "politicians," a human element, interfering with the works.[31] Modernly, this is expressed in a certain legalism. For example, it is right to avoid taxes by all legal means. That "there ought to be a law" reflects this mechanistic and legalistic outlook.

And thus, while all agree that public decisions should be made upon the merits, there is conflicting thought as to the means to be employed to achieve this ethical end. There is, on the one hand, a force theory of law,[32] wherein the means to be employed are those of command [33] and sanction.[34] Under this view the problem of ethics is a complex one,[35] its solution being for provisions to be spelled out in detail with content, thereby furnishing the criteria for choosing one normative principle to decide a case rather than another.[36] An English theme, [37] on the other hand, relies less on provision and penalty, although both are undoubtedly present, but more on a sense of obligation upon the part of those involved.[38] And in view of the success of the latter approach, it would seem that some step in this direction might be taken in this country. For civilization progresses when it becomes generally felt that just a few ideas are universal.[39] And public responsibility can be broken down into several components such as reaching decisions on the merits, little suggestion of impropriety, and the evolution of such provision as would invite men of character to serve the nation. Thus standards may be legislated for leadership, and have been, although they may be inappropriate. On the threshold of new responsibility, present and proposed ethical provision might be reviewed for simple alternative.

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[29] Pound, *op. cit. supra* note 13, at 737.

[30] Graham, *op. cit. supra* note 14, at 38.

[31] *Ibid.*

[32] Goodhart, *English Law and the Moral Law* 10 (1953).

[33] *Ibid.*

[34] *Id.* at 14-18.

[35] See *e.g.* Cohen, Felix S. *Ethicals Systems and Legal Ideals,* Ch. on "Legal Ideals and the Good Life," 43-112 (1933).

[36] Northrop, *The Complexity of Legal and Ethical Experience* 69 (1959).

[37] Goodhart, *op. cit. supra* note 32.

[38] *Id.* at 20-21.

[39] Graham, *op. cit. supra* note 14, at 63.

As an initial consideration of what may achieve these objectives, attention might be given to existing statutory provision. Congressmen, Commissioners, resident and Government officers and employees are presently prohibited by Section 281 of Title 18 from rendering services for compensation with reference to any matter in which the United States is directly or indirectly interested.[40] Further injunction is made by Section 216 against their accepting payment in connection with the procurement of Government contracts.[41] Officers and employees may not, under Section 283, (other than in proper discharge of duty) aid or assist, with or without compensation, the prosecution or support of claims against the United States.[42] They, pursuant to Section 434, must disqualify themselves in official dealings involving a business entity with which they have interests.[43] They may receive no outside compensation, under Section 1914, for services as such official or employee, except from governmental entities, nor may any person, association or corporation supplement their salaries.[44] And for two years after Government service, civil penalties are provided by Section 99 of Title 5, for acting as counsel, attorney or agent in the prosecution of claims against the United States, where such claims were pending in the officer's or employee's department while he was employed.[45] And criminal penalties attach, under Section 284 of Title 18, to such action involving subject matter as to which former officers and employees, including commissioned officers, of any agency were directly connected.[46]

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[40] Rev. Stat. § 1783 (1875), 18 U.S.C. § 281 (1958):

> "Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party of directly or indirectly interested, before any department, agency, court martial, officer, of any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.
>
> "Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government in whose service he holds a retired status.
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> "This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially exempted by Congress."

[41] Rev. Stat. § 1781 (1875), 18 U.S.C. § 216 (1958). See text, note 56 *post*.

[42] Rev. Stat. § 5498 (1875), 18 U.S.C. § 283 (1958). See text, note 56 *post*.

[43] Rev. Stat. § 1783 (1875), 18 U.S.C. § 434 (1958). See text, note 74 *post*.

A committee of Congress,[47] headed by Representative Emanuel Celler of New York has been considering a revision of the bribery laws,[48] additions to the Administrative Procedure Act,[49] special consideration of retired personnel in defense industries,[50] and the problem of whether there should be any different standards as between regular and intermittent personnel.[51] Such a complete overhaul of the laws as is contemplated, however, may be undesirable in view of the judicial interpretation that has grown up with reference to them, a body of law acceptable to the Department of Justice.[52] Consolidation, nevertheless, of the several statutory provisions [53] relating to the receipt of outside compensation for governmental services might be in order. Such sections historically appear on the books as a result of periodic resurgence of interest in the problem,[54] and, as a result, the law is confusing and gaps appear. For example, Section 281 of Title 18 literally prohibits those officers and employees covered thereby from receiving any compensation.[55] Again, Sections 216, 283, and 1914 of such Title weaken 281 by particularizing [56] or repeating [57] the latter. Neither the temptor, as contrasted with the tempted, is covered by Sections 281 and 283,[58] nor is preemployment, as contrasted with post-employment, compensation of a conflicting nature prohibited by any of these sections.[59] That no officer or employee may aid or assist the support of any claim against the United States, as 283 on the other hand provides, seems out of date. It would appear, therefore, as a first step in a modern treatment of the problem, that Sections 216, 283 and 1914 of Title 18 could be repealed. Section 281, on the other hand, should be amended to allow Government employees to collect their salaries. And further, to remove the gaps referred to, such Section could be amended by inserting, between the present prohibition and the sanction therefor, the following paragraph:

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[44] 39 Stat. § 1106 (1917), 18 U.S.C. § 1914 (1958): "Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treatsury of any State, county or municipality; or

"Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States—

"Shall be fined not more than $1,000 or imprisoned not more than six months, or both."

[45] Rev. Stat. § 190 (1875), 5 U.S.C. § 99 (1952); text, note 79 *post,* and see also, note 82.

[46] 41 Stat. § 131 (1919), 18 U.S.C. § 284 (1958), text, note 79 *post.*

[47] Celler Comm., *op. cit. supra* note 4.

[48] Ch. 11, 18 U.S.C.

[49] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952).

[50] As suggested by the He'bert Comm., *op. cit. supra* note 4.

[51] As suggested by the Association of the Bar of the City of New York, Report, *op. cit. supra* note 6, now before the Celler Committee as H.R. 10575.

[52] Celler Comm., *op. cit. supra* note 4, at 586.

[53] 18 U.S.C. § 281, 216, 283 and 1914, notes 40, 41, 42 and 44 *supra.*

[54] Report, *op. cit. supra* note 6, at 29-56.

> "Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services, actually or purportedly rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered is about to become, is, or was such a Member, Delegate, Commissioner, officer, agent, or employee—" [60]

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[55] See note 40 *supra.*

[56] 18 U.S.C. § 216, note 41 *supra:* "Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he is qualified, or being an officer, employee or agent of the United States, directly or indirectly takes, receives, or agrees to receive, any money or thing of value, for giving, procuring or aiding to procure to or for any person, any contract from the United States or from any officer, department or agency thereof; or

"Whoever, directly or indirectly, offers, gives, or agrees to give any money or thing of value for procuring or aiding to procure any such contract—

"Shall be fined not more than $10,000 or imprisoned not more than two years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

"The President may declare void any such contract or agreement." 18 U.S.C. § 283, note 42 *supra:* "Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, acts as an agent or attorney for prosecuting any claim against the United States, or aids or assists in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties, or receives any gratuity, or share of or interest in any such claim in consideration of assistance in the prosecution of such claim shall be fined not more than $10,000 or imprisoned not more than one year or both." (The Section continues similarly to 18 U.S.C. 281, note 40 *supra*).

[57] Compare note 44 with note 40 *supra.*

[58] See notes 40 and 56 *supra.*

[59] Celler Comm., *op. cit. supra* note 4, at 587.

[60] *Id.* at 495.

The Association of the Bar of the City of New York has urged, nevertheless, that a distinction should be made between regular and intermittent[61] employees in order to meet the problem of those who work without compensation, or "WOC's," and those who are compensated only at intervals while actually employed, or "WAE's." The City Bar advances this proposal in view of its stated principle underlining any governmental ethical provision, the necessity of recruiting qualified personnel.[62] Such Bar's alternative legislation before the Celler Committee[63] contains a general emphasis on this distinction which is currently being handled by exemption statutes.[64] And while this current treatment may not be ideal,[65] it seems workable,[66] and it is unlikely that any change will be made.[67] Other aspects of the City Bar's proposal, such as gifts,[68] abuse of office[69] and illegal payments,[70] if not already covered by bribery statutes, might be encompassed by an expanded definition of "compensation" to include anything of economic value, given, received, or solicited by virtue of one's official position as well as services.[71]

But there is yet another area of statutory changes before Congress involving a true ethical consideration[72] as compared to the question of common venality reflected by its reconsideration of the bribery laws. This relates to the necessity of anyone's disqualification where personal interest and duty are in conflict, long a tenet of propriety.[73] Section 434 of Title 18[74] presently touches such area, generally disqualifying officers and employees from dealing, on behalf of the Government, with business entities in which they have a pecuniary interest. Extension of this disqualification to such person's spouse and child and organizations he may favor because of negotiation or arrangement for prospective employment is now being considered.[75] As to this proposal, while its broadness may create enforcement problems, there is virtually unanimous agreement.[76] As to the extent of this disqualification continuing past employment, however, there is a divergence of views. The Canons of Professional Ethics of the American Bar Association provide a permanent ban as to lawyers who have retired from governmental service in connection with any matter they have investigated or passed upon while in public office or employ.[77] The New York City Bar would extend such prohibition to include, in its view, a larger area of action,[78] but would continue existing two year statutory provisions [79] where post-employment transactions relate to an officer's official responsibility, merely, while with the Government.[80] The proposal before Congress, on the other hand, would enact a permanent ban in areas of former responsibility, but would provide the two year restriction as to other matters involving a former agency.[81]

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[61] Defined as employees working not more than 52 working days (not including Saturdays, Sundays, and holidays) out of the preceeding year, with legislative exemption for reservists and Presidential extension of 130 days, Report *op. cit. supra* note 6, at 269-272.

[62] *Ibid.*, and note 27 *supra*.

[63] H.R. 11571, 86th Cong., 2nd Sess., Celler Comm., *op. cit. supra* note 4, at 513-526.

[64] See Report, *op. cit. supra* note 6, at 69 for a list of such enactments.

[65] Exemption statutes lack uniformity, *id.* at 66.

[66] Celler Comm., *op. cit. supra* note 4, at 602.

[67] *Ibid.*

[68] Report, *op. cit. supra* note 6, at 290-291.

[69] *Id.* at 291.

[70] *Id.* at 295.

[71] In the case of Congressmen, exemption, if such definition were adopted, would have to be made for campaign contributions, unless alternative means of getting elected were designed, see Graham, *op. cit. supra* note 14, at 295.

[72] See Report, *op. cit. supra* note 6, at 43.

[73] See *e.g.*, American Bar Association, *Canons of Professional Ethics*, Canons 6, 10 and 11 (1958), and Canons 24, 26, 27 and 29, *op. cit. supra* note 18.

[74] 18 U.S.C. § 434, note 43 *supra:* "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any

Overlap may perhaps be removed in this area, however, by

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corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

[75] Report, *op. cit. supra* note 6, at 583.

[76] *Id.* at 42-44; Celler Committee, *op. cit. supra* note 4, at 592-593.

[77] Canon 36, note 73 *supra.*

[78] Report, *op. cit. supra* note 6, at 273

[79] 5 U.S.C. § 99, note 45 *supra:* "It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments, while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee." 18 U.S.C. § 284, note 46 *supra:* "Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000 or imprisoned not more than one year, or both."

[80] Report, *op. cit. supra* note 6, at 292.

[81] *Ibid.*

repeal of present provisions for the two year ban [82] and amending 18 U.S.C. 284 by inserting in place of the text before the penalty the following:

> "Whoever, having been employed in any agency of the United States, including a commissioned officer assigned to duty in such agency, acts as private representative in a matter as to which he had taken action for the United States while in the employ thereof—" [83]

This, of course, would provide a permanent ban. The idea persists, nevertheless, that there should be some "cooling off period," [84] particularly in the case of high ranking [85] and military personnel.[86] Any suspicion, however, engendered by the large number of retired generals and admirals employed in defense industries might be diminished, on the other hand, by repeal of those statutes,[87] which forbid the United States from hiring former employees receiving retirement pay.

Change of criminal penalties provided for existing conflict of interest laws is apparently not contemplated by Congress.[88] The present provisions of Sections 216 and 281 of Title 18,[89] which require, in addition to criminal sanction, disqualification of an offender thereof from holding any office of honor, trust or profit under the United States are also retained in pending proposals.

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[82] 5 U.S.C. § 99, note 45 *supra,* and 67 Stat. § 437 (1953), 5 U.S.C. § 59(c) (1958): "No payment shall be made from appropriations in any Act to any officer on the retired lists of the Regular Army, Regular Navy, Regular Marine Corps, Regular Air Force, Regular Coast Guard, Coast and Geodestic Survey, and Public Health Service for a period of two years after retirement who for himself or for others is engaged in the selling of or contracting for the sale of or negotiating for the sale of to any agency of the Department of Defense, the Coast Guard, the Coast and Geodestic Survey, and the Public Health any supplies or war materials."

[83] From a suggestion from the Department of Justice, Celler Comm., *op. cit. supra* note 4, at 585.

[84] *Id.* at 531.

[85] Douglas, *op. cit. supra* note 6, at 62-63.

[86] Compare two year prohibition of Senators Douglas and Javits with reference to the military, He'bert Comm., *op. cit. supra* note 4, at 47, 67, with the five year proscription proposed of Rep. Santangelo, *id.* at 61, and a latter suggestion of three years (to allow for the normal rotation of officers) to be limited possibly to procurement personnel, *id.* at 142.

[87] 47 Stat. 406 (1932), as amended, 5 U.S.C. § 59(a) (1958); 28 Stat. 205 (1894), as amended, 5 U.S.C. § 62 (1958) and see Report, *op. cit. supra* note 6, at 327. Note also that the permanent ban of 18 U.S.C. 284, note 40 *supra,* in the selling area would be continued, but specific reference as to this in respect to the Navy, 70A Stat. 381 (1956), 10 U.S.C. § 6112 (1958), would appear to be superfluous.

[88] Celler Comm., *op. cit. supra* note 4, at 495-496.

[89] See text of 18 U.S.C. 281, note 40 *supra.*

That such violations are on the order of treason[90] cannot be doubted. The area of change under consideration is statutory recognition of administrative implementation. Pending before the Congress, in this regard, there are a proposed amendment to the Administrative Procedure Act,[91] and a comprehensive Act[92] advanced by the New York City Bar Association, both of which place emphasis on administrative sanction. The substantive portions of the Procedure Act amendment initially include, for administrative action, provisions which also carry the criminal penalty. In addition, other prohibitions against employees and those outside the Government are provided in certain areas. These are participation in frequent and expensive social engagements, gifts or favors; unauthorized divulgence and use of confidential information, suspicious conduct, and the employ of former Government employees in violation of conflict of interest laws.[93] Certification by those appearing before governmental agencies to the effect that there has been no violation of post-employment restrictions is also required as to the latter provision. Again, after notice and hearing, provisions for dismissal or suspension of erring employees, and of offending industries, together with voidance of Government contracts by the President are provided where violations occur.[94]

Similarly, the New York City Bar proposal while relying on criminal penalty for seven substantive sections,[95] also puts heavy emphasis on administrative remedies. The justification for this is placed upon the following grounds:

> "There are several reasons for strengthening the administrative process relative to the criminal process in the handling of conflict of interest problems. One reason is that as a practical matter the criminal laws in this field have been, and predictably will be, seldom used. Overreaching statutes are usually left unenforced.

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[90] Rev. Stat. § 5331, 5332 (1875), 18 U.S.C. 2381 (1958), proscribing, in part, same penalty for treason.

[91] Note 49 *supra.*

[92] Note 63 *supra.*

[93] A prohibition against *ex parte* representation to agency members or employees regarding issues, in contested hearings was apparently later dropped. Compare Celler Comm., *op. cit. supra* note 4, at 15 with 498, *id.* This was apparently at the behest of the American Bar Association which included such subject in another amendment, *id.* at 319-324, and felt that rules respecting such communications were more of a procedural, than conflict of interest problem. For legislative history of the American Bar's proposal, see Report, *op. cit. supra,* note 6, at 22n.

[94] H.R. 2157, 86th Cong., 1st Sess. (1960).

[95] Report, *op. cit. supra* note 6, at 304.

> Further, the necessity of relying exclusively on criminal remedies has led draftsmen to the further necessity of drawing the statutory restrictions with an unfortunate, narrow rigidity. This kind of concreteness is essential for criminal enforcement. When it is attempted in an area of broad ethical regulation, it may be expected to produce exactly what it has produced—restrictions that are in some areas so narrow as to miss the problems, and are in other areas so vague and ill-defined as to be criminally unenforcible as a practical matter. * * * Finally, criminal penalties are out of keeping with the character of many of the offenses prescribed in the conflict of interest statutes. This is true because conflicts of interest uniquely raise the problem of 'evil in embryo.' Legislation against conflicts of interest is prophylactic in its nature; it seeks to head off evil before it comes. * * *"[96]

In keeping with this view, Section 10 of the New York City Bar Association's proposed Bill makes the President responsible for regulations to be issued as required by such legislation, his regulations taking precedence over those of agency heads with reference to the problem. For this purpose the President is assisted by an Administrator to consult with the Attorney General, the Chairman of the Civil Service Commission, the Comptroller General and other appropriate officials, and to make studies and to provide reports and information to the President and the Congress. Agency heads must also promulgate regulations, with a copy thereof to the Administrator, and they are empowered to conduct investigations, including the giving of oaths and the subpoena of witnesses in connection with such inquiry.[97]

In addition, Section 11 provides that an agency head may, and shall do so if provided by regulations issued by the President, establish additional procedures for preventing violations. A suggested procedure is that new employees (and old employees periodically) sign a statement that they have read an appropriate summary of the Act and regulations issued thereunder. Another suggestion is a periodic report as to any non-public employment or self-employment.[98] Section 12,[99] apart from providing treble damages against employees and former employees, who violate the Act to their economic advantage, and provision for civil penalty as to outsiders who bestow gifts and favors,[100] appears to be identical with the proposed amendment of the Administrative Procedure Act.[101] Such section also provides that the President may cancel and rescind any Government action, without contractual liability to the Government, if he finds a violation has substantially influenced any official decision, and if in his judgment that the interest of the United States, including those of innocent third persons, so require. The findings of the President are apparently subject to hearing procedure and judicial review, although not apparently his judgment.[102]

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[96] *Id.* at 190.

[97] *Id.* at 296-298.

[98] *Id.* at 298-299.

[99] *Id.* at 299-303.

[100] *Id.* at 303.

It would appear therefore, that all of the remedies, criminal, administrative, and civil have been thoroughly explored, even to a black or gray listing of offending industries. The black and gray areas of conduct, the reliance placed upon reports, upon administrative regulations and procedures does not seem, however, to be really compatible with the New York City Bar Committee's second principle, the recruitment of personnel.[103] Moreover, the same thing might be said of regulations as was said by such Committee as to legislation generally:

> "Statutes are words on paper. They do not enforce themselves, and they do not automatically penetrate the minds of those whose conduct they are intended to affect." [104]

And while its conclusion, here, was that statutes are only as effective as their administration, administrative regulations persist and abound without, perhaps, the necessity of further statutory blessing. The needed implementation, may be not more administration, but voluntary participation by those administered. It is probably in this realization that both the New York City Bar Committee and the Celler Committee append to their reports notes as to Great Britain's treatment of the problem of ethics in government.

From these notes it appears that the same matters of concern to the Bar and Congress are covered.[105] The source of British provision, however, derives from two short Parliamentary enactments[106] and several regulations.[107] This paucity of material was explained as follows:

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[101] See text to note 94 *supra*.

[102] Report, *op. cit. supra* note 6, at 302.

[103] Note 27 *supra*. Otherwise expressed as "unnecessary clogs which fetter government recruitment," Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation*, 107 U. Pa. L.R. 985, 986 (1959).

[104] Report, *op. cit. supra* note 6, at 72.

[105] *Id.* at 314-318; Celler Comm., *op. cit. supra* note 4, at 838-843.

> "No attempt has ever been made to prepare a complete list of matters which, because of the particular character and duties of the Civil Service, require regulation, nor has it ever been thought necessary to lay down a precise code of conduct because civil servants jealously maintain their professional standards. In practice the distinctive character of the British Civil Service depends largely on the existence and maintenance of a general code of conduct which, although to some extent intangible and unwritten, is of very real importance."[108]

And in this country, too, it is suspected that if the ideal of ethical government is to thrive, some such similar intangible and unwritten code of conduct must evolve within its leadership.

The New York City Bar Association in choosing the President for responsibility in this area, in this view, seems eminently to be on the right track. For this office is the symbol of prestige in America,[109] and if there would be any style in government, it is the President who must be the *arbiter elegentarium*. Such Bar's proposal and the present statutory provision[110] involving the President in voiding contracts, procured in violation of ethical standards, might be avoided, however, by the repeal of the statute, and allowing the courts to decide what contracts violate public policy. A superstructure, moreover, of administrative regulation, seems only appropriate until America comes of age. Congress might, at least, refrain from adding to it. And distinctions between those who serve, except possibly in the political policy area,[111] and, also perhaps, provision for a reserve corps,[112] probably should not be made. To distinguish between regular and intermittent employees as the City Bar suggests, may well lead to a confusing double standard.[113]

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[106] Official Secrets Act, 1911 and 1920, 1 & 2 Geo. 5, c. 28, 10 & 11 Geo 5, c. 75; Prevention of Corruption Act, 1906, 6 Edw. 7, c. 34.

[107] A Treasury Circular of April 27, 1925:

> "1. No officer may at any time engage in any activity which would in any way tend to impair his usefulness as a public servant.
>
> "2. No officer may engage in any occupation or undertaking which might in any way conflict with the interest of his department or be inconsistent with his position as a public servant.
>
> "3. It is the duty of any officer, who may have any doubt as to the propriety of undertaking any particular work to consult the head of his department, or the Establishment Officer." Celler Comm., *op. cit. supra* note 4, at 841.

[108] Report, *op. cit. supra* note 6, at 314.

[109] Graham, *op. cit. supra* note 14, at 153.

[110] 18 U.S.C. 216, note 56 *supra*.

[111] Note 71 *supra*.

[112] Graham, *op. cit. supra* note 14, at 212.

And the fact that persons do go in and out of the Government does not seem extraordinary if the bounds of propriety are maintained. Thus, again the New York City Bar's Section 5 dealing with this area appears a step in the right direction. It generally makes allowance for continuation of industry gained pensions and other plans [114] so as to make interchange of personnel between industry and Government not so replete with financial loss. A further consideration beyond this period might even provide for a fair interchange of pensions whether they be publicly or privately earned, if one stays in either capacity longer than five years.

The New York study has researched well all aspects of the problem. The only complaint is the detail of its solution. Advantages to morale and morals may accrue with a softer rendition. If unrealistic features are present in existing laws, the solution may be to repeal them. But in their stead, too great detail and too much reliance on administrative sanctions seems inappropriate to the elusiveness of the goals such legislation is designed to achieve. The law must be such that characteristic American individualism, which has so greatly aided private interest, may be given initiative to develop the public interest. Conflict as between existing provisions should be removed, but administration of the residue should not, perhaps, be so overwhelming as to dismay the innocent.

Two or three direct statements on the subject, without great detail, would approach the English theme. Successful implementation of any legislation and regulation would appear, in any event, to depend upon the development of a high standard of conduct by Government personnel. Utilization could be made of existing codes such as are supplied by the law profession [115] and the military.[116] And a sense of propriety will evolve, of course, from the experience of a world-wide responsibility and from the prestige that goes with responsibility. Americans are now in the same situation, as were and are the British, and, no doubt, their needs will be met by dedicated citizens in and out of Government.

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[113] For example, under Section 6 of this proposal, *id.* at 290-291, no employee may accept gifts and favors from any persons, but regular employees are additionally prohibited from receiving them from *officers and directors* of such persons in contractual, regulatory and other duty areas. The implication is that corporate gifts to intermittent employees in such areas might be allowed.

[114] *Id.* at 288-289. "* * * Many citizens will accept lower pay on a government assignment, but few will, in the name of conflict of interest, throw away future security plans to accept government appointment." *Id.* at 183.

[115] A Resolution Adopted by the House of Delegates of the American Bar Association was presented to the Celler Committee recommending Federal court disbarment and suspension procedures as to lawyers violating conflict of interest laws and ethics. Celler Comm., *op. cit. supra* note 4, at 326-327.

Indicative, perhaps, of a growing awareness of this country's world responsibility is an interest in the problem of ethics in local matters.[117] The origin of this interest probably derives from service by lawyers on local boards, a realization by them that governing is a fiduciary obligation, and a carry-over by them of ethical considerations involving trust situations.[118] Disclosure of conflicting position has been suggested,[119] then withdrawal and remaining passive has been indicated[120] as proper conduct when one's service on civic or state agencies touches upon a personal interest. That a constructive trust be imposed for derelict example of breach of public position has also been advanced[121] as an alternative to criminal and administrative sanction. But it is significant, perhaps, that a Philadelphia study[122] of the problem reaches this conclusion:

> "And ultimately, of course, no procedural implement, however, well conceived and well enforced, can, of itself, guarantee administrative honesty. * * * In the last analysis, it is the man rather than the rule by which he is governed, to whom we must look for the maintenance of enduring standards of governmental integrity."[123]

Too detailed legislation and regulation will hardly invite men experienced in responsibility, into any government. Rule there must be but it must not obscure its purpose. To be in the public service is to be in a fiduciary capacity. To those who so serve, trustees of great tresponsibility both for the present and the future, there should be accorded the prestige which should go with their tasks. For politics is no longer a game to be played in the wards. It is world-wide and involves all.

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[116] See suggestion of Hon. Carl Vinson to the effect that were conflict removed from the conflict of interest laws, the sanction of court-maritial is available, Celler Comm., *op. cit. supra* note 4, at 557-558.

[117] Note, *op. cit. supra* note 103. Note, *The Doctrine of Conflicting Interests Applied to Municipal Officials in New Jersey,* 12 Rutgers L. Rev. 582 (1958).

[118] "The common-law doctrine of conflict of interests found its origin in the law of trusts, which dictated that a trustee could not, without authority, be pecuniarily interested in the affairs or interests of his beneficiary," Note, *op. cit. supra* note 103, at 985. And see Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office,* 54 Colum. L. Rev. 214 (1954).

[119] Note, *op. cit. supra* note 103, at 1021.

[120] Note, *The Doctrine of Conflicting Interests Applied to Municipal Officials In New Jersey, op. cit. supra* note 117, at 594.

[121] Lenhoff, *op. cit. supra* note 118, at 215-217.

[122] Note, *op. cit. supra* note 103.

[123] *Id.* at 1026.

A DETAILED PROPOSAL IN "DIRECT ENGLISH" FOR STATUTORY IMPLEMENTATION OF ETHICAL PRINCIPLES

By WILLIAM HOPPEN *

> "Henry W. Grunewald testified today that he had received a $25,000 fee in 1949 from a New York attorney who later got speedy handling of a half million dollar corporation tax refund. . . .
>
> "John E. Tobin, subcommittee counsel, read from revenue records that Mr. Oliphant had transferred this case to the 'head of the list' and had approved the refund two months after Grunewald had intervened. Mr. Tobin said after the hearing that this was 'unheard-of' speed in such cases. . . .
>
> " 'Isn't that what you got your $25,000 fee for?' Mr. Tobin asked Grunewald.
>
> " 'Naw,' Grunewald said with a wave of his hand. 'I did not. That is all Greek to me. I just called a fellow (Mr. Oliphant) and said Joe Blow is coming over. That's all there was to it.' ". . .
>
> New York Times, Apr. 22, 1953, p. 32, col. 4.

The connection between Mr. Grunewald and the subject, the problem of influence and ethics in Government, however, is hardly Greek;—

Long before the mink coats and deep freezers, and Mr. Grunewald's enigmatic performance as a star in the House investigation of tax frauds, there has been an aroused interest in standards of public administration. With the perceptive study of the Federal conflict of interest problem by the Special Committee of the Association of the Bar of the City of New York,[1] this choice of subject is most timely.

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* Member of the New York Bar.

[1] The Association of the Bar of the City of New York, Special Committee on the Conflict of Interest Laws, CONFLICT OF INTEREST AND FEDERAL SERVICE (Harv. Univ. Press, Cambridge, 1960).

A number of professions, including the legal, have broad canons of ethics[2] which define relationships intraprofessionally as well as with the public. Various states and municipalities, too, have addressed themselves, more closely to the subject at hand, to the moral betterment of their employees by fiat.[3] In the Government agency field, the code adopted by the Securities and Exchange Commission[4] has been helpful in my consideration of the broader aspect of the agencies' duties, and forms a large part of my proposal for a Code of Administrative Ethics.

I like the way Mike DiSalle had his Korean War O.P.S. regulations put in simple direct English and, at the risk of some confusion to those who expect more "whereases" and "heretofore's" in a legal publication of the Journal's standing, have done so here.

I have broadened the proposed Code beyond the immediate problem of honesty in office and the avoidance of the grosser forms of official villainy. The responsibility of a public servant is a positive one, to do an effective over-all job; and a Code should help him as much in that as it helps him to resist the siren call of the Grunewalds.

There is also the problem, of equal importance with the problem of honesty in Government, of getting able people to work for it in the first place, a problem to which the Bar Association survey addressed itself with good effect.[5]

This proposed Code is also based in part on the framework (including the definitions) of the proposed Federal Executive Conflict of Interest Act recommended by the Bar Association survey.[6] This is necessarily general, and will have to be broadened at the agency level, as envisioned in the proposed Act.[7]

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[2] The Association of the Bar of the City of New York, CANONS OF PROFESSIONAL ETHICS (amend. 1952); *id.*, CANONS OF JUDICIAL ETHICS (amend. 1952); also, F. M. Marx, *Administrative Ethics and the Rule of Law*, 43 AM. POL. SCI. REV. 1119, 1121 n. 4, 1122 n. 5 (1949).

[3] N. Y. Executive Law, §§ 63, 74, N. Y. Public Officers Law, §§ 73, 74, L. 1954, chaps. 696-698; Tex. Civ. Stat., art. 6252-9, Acts 1957, 55th Leg., chap. 100, p. 213; Charter of the City and County of Honolulu, art XI, Act 261, S. L. H. 1959; N. Y. City Administrative Code, § 898.1-0, § B1-70, Local Laws 1959, Nos. 73, 74; also, New York Times, Mar. 21, 1961, p. 29, col. 4 (N. J. Senate); Citizens Commission on Ethics in Government, Arlington County, Virginia, CODE OF PUBLIC ETHICS (1952); Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation*, 107 U. PA. L. REV. 985 (1959).

[4] Securities and Exchange Commission, CANONS OF ETHICS FOR MEMBERS OF THE SECURITIES AND EXCHANGE COMMISSION (1958).

[5] The Association of the Bar, *op. cit. supra* note 1, at 3, 137-142, 152-164, 180-184, 260.

I realize statutes (and Codes!) are often not the most entrancing reading, but will have a few more words to say at the end!—

What Principles and Provisions Should be Incorporated in a Code of Ethics for Administrative Agencies

CODE OF ADMINISTRATIVE ETHICS

Preamble

A Code of Ethics, under the Executive Conflict of Interest Act, is desirable to set forth for the guidance of Government employees the general standards of conduct reasonably to be expected of you as public servants.

The public has the right to expect courtesy, and an honest day's work for a day's pay;—but working for the Government is more than merely a matter of money: It is the expression of a common human desire to serve.

In a broader sense, as public servants, you are the trustees for all of the people, and beyond the requirement of daily loyalty to your job you are held to a broad standard of fiduciary duty to act in scrupulous good faith and candor for the benefit of the public's interest.—

As a public servant, you make an effort to be aware of the feelings of persons dealing with you and your agency, and help them in every way consistent with your official position.

1. *Constitutional Obligations.* You have undertaken to support the Constitution. You must faithfully execute the laws which you are charged with administering by your duties under the Constitution, and shall also carefully guard against the infringement of the constitutional rights, privileges and immunities of those with whom you deal.

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[6] The Association of the Bar, *op. cit. supra* note 1, at 258-310; S. 603, 87th Cong., 1st Sess. (1961); see New York Times, Mar. 13, 1961, p. 1, cols. 2-3. This Code has been drawn only with reference to regular Government employees. In the interest of clarity, and of effective employee training, I think the code for intermittent employees and the one for those involved in contracting out should be drawn separately.

[7] The Bar Association survey recommended a three-stage procedure: I—Consolidating the present conflict of interest statutes into a proposed Executive Conflict of Interest Act; II—Giving the President responsibility to draw up regulations

2. *Statutory Obligations.* In administering the law, you shall obey the law yourself, and vigorously enforce compliance by all persons affected. In the exercise of rule-making powers, you shall always be concerned that the rule-making power is confined to the proper limits of the law and is consistent with the statutory purpose. In the exercise of judicial functions, you shall honestly, fairly and impartially determine the rights of all persons under the law.

3. You shall scrupulously obey all of the provisions of the Executive Conflict of Interest Act, pertaining to the avoidance of conflicts of interest, the definitions and provisions of which are here incorporated, the statutes pertaining to prohibition of unlawful political activity and campaign contributions, and shall obey all agency regulations made in conformance with these statutes and this Code, and others prescribing administrative procedures.

4. *Canons of Ethics.* If you are doing a judge's work, then you must act like a judge: follow the Canons of Judicial Ethics; if you are a lawyer, follow the Canons of Professional Ethics of the legal profession and, if you are doing other professional work, then follow the code of ethics of your particular profession. They are not inconsistent with, but supplement and amplify this Code.

5. *Personal Conduct.* You shall conduct yourself, not only in the performance of the duties of your office but also in your everyday life, in a manner beyond reproach; and shall not engage in any conduct that will raise public suspicion that you are acting in a manner not befitting your public office or engaging in acts that are contrary to your public trust.

6. You realize that working for the Government places certain restrictions on you as a public servant. It is necessary that you, as such servant, not only be entirely proper in all your dealings with applicants and the public, but that you avoid the slightest appearance of impropriety.

7. Thus you shall not, by your conduct, give reasonable basis for the public impression that any person can improperly influence or unduly engage your favor in the performance of your official duties, that any person unduly enjoys your favor, or that you are

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for the Executive branch; and, III—Giving each agency head power further to draw regulations tailored to the particular need, and the responsibility of day-to-day enforcement. The Association of the Bar, *op. cit. supra* note 1, at 191.

affected by the kinship, rank, position, prestige or influence of any person or organization.

To be above criminality is not enough; you must be, like Caesar's wife,[8] above suspicion.

8. *Maintenance of Independence.* You shall maintain, at all times, a spirit of firm independence in deciding cases and in the performance of your duties, and shall reject any improper effort, including any outside pressure from the Legislative or other parts of the Executive branch, to affect your independent determination of any matter in a quasi-judicial proceeding. You shall not be swayed by partisan demand, public clamor, or considerations of personal popularity or unpopularity. Have no fear of unjust criticism.

9. *Relations to Superiors.* You owe complete frankness to your official superiors in all matters of business before you. You shall present all the information and considerations that bear upon your responsibility in the organization which will enable them to make a competent decision; and you shall be loyal to the program in which you are employed, and loyal to the objectives of the Administration.

10. When your private loyalties, as a public servant, conflict with your official loyalties so as to make a reasonable standard of conformance impossible, you must resign or ask for a transfer.

11. *Relations With Your Fellows.* You shall recognize that your conscientious views and the conscientious views of others may differ, and that variant opinion should be welcome. The free expression of opinion is a safeguard against minority domination,

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[8] A recent instance involving Merl Young's wife might be of some interest. In the investigation of the Reconstruction Finance Corporation (New York Times, Feb. 28, 1951, p. 19, col. 1) it appeared that someone bought Mrs. Young a coat:

> "On or about the fifteenth, Mr. Wheeler said, Mr. and Mrs. Young appeared and selected a coat of 'natural royal pastel mink,' one of 'the better' garments in the shop. * * *
>
> "Before the alterations had been completed, Mr. Wheeler testified, word was received from 'Mr. Frank Rosenbaum' to transfer the transaction to the account of 'Col. Joe Rosenbaum.'
>
> "As the Rosenbaum firm had represented the furrier in the R.F.C. loan application, Mr. Wheeler said, a ten percent discount had been made. * * *
>
> "When the purchase was transferred to the Rosenbaum account, Mr. Wheeler said, the sales slip identifying the purchase as being one for Mr. Young's account was apparently destroyed.
>
> " 'Wasn't this a rather unusual transaction?' asked Senator Fulbright.
>
> " 'It is not so unusual in our type of business,' Mr. Wheeler observed. The audience guffawed." * * *

and a keystone of good administration. However, you should never permit your personal opinion so to conflict with the opinion of another so as to develop animosity or unfriendliness, and every effort shall be made to reach a common conclusion.

12. The personal relationships of public servants, whether of friendship or otherwise, shall not influence the conduct of your office.

13. *Relations With the Public.* You are under a continuing duty of fiduciary loyalty to the public and its interest that overrides all others, since the public welfare is your sole end. In all matters before you, you shall promptly and wisely dispose of pending matters, and shall administer the law without regard to any personality involved, and with regard only to the issues.

14. You shall not, as a public servant, represent any views other than that of the public interest, pursue your own private ends in the business that comes before you, or withhold the prompt settlement of any transaction or the provision of any legally available service which is in your power, but shall act and decide in strict conformance with the data available to you and the statutes and regulations.

15. Since only what serves the general interest of the public is best, it is a breach of official faith to show favoritism or jealousy in the course of your official duties on grounds of race, creed, class, sex, family ties, friendship, and all those other conflicting special interests and loyalties that command us even when we are most unconscious of them, and precisely then have their most powerful influence.

16. *Gifts.*[9] You shall not receive, accept, take, seek, or solicit, directly or indirectly, any thing of economic value as a gift, gratuity, or favor from any person if you have reason to believe the

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[9] On this general subject, Mr. Grunewald, who spoke above (page 1) of the ease of acquiring largesse in Washington, advised the Ways and Means subcommittee of the generous way in which he distributed it (New York Times, Apr. 22, 1953, p. 32, cols. 4-5):

> "At one point, Grunewald said he had formed his own 'Christmas Tie Club' and had given away about $4,000 in ties from 1947 to 1951 at about $7 a tie.
>
> "'It was just a friendly act for friends I knew,' he explained. 'They were the highest class people. Whether they were politicians or Senators or Congressmen or bank presidents, I couldn't recall off hand.'
>
> "'Wasn't that a lot to give away?' Mr. Tobin asked.
>
> "'That's not much to give away—not to friends. That's the way I feel about it.'"
>
> * * *

donor would not give the gift, gratuity, or favor but for your office or position within the Government.

17. You shall not receive, accept, take, seek, or solicit, directly or indirectly, any thing of economic value as a gift, gratuity, or favor from any person, or from any officer or director of such person, if you have reason to believe such person—

> (1) has or is seeking to obtain contractual or other business or financial relationships with your agency; or
>
> (2) conducts operations or activities which are regulated by your agency; or
>
> (3) has interests which may be substantially affected by your performance or nonperformance of official duty.

18. This ban against gifts includes not only money or "Christmas presents," but such things as free meals or drinks. The safest rule to follow in such borderline situations is, "Don't." [10]

19. All gifts which cannot appropriately be refused, such as ceremonial or public gifts, shall immediately be assigned to charitable, educational or welfare purposes.

20. *Abuse of Office.* Except in the course of your official duties or incident thereto, you shall not, in your relationships with any person specified in the succeeding sentence, use the power or authority of your office or position within the Government in a manner intended to induce or coerce such other person to provide you or any other person with any thing of economic value, directly or indirectly. This canon shall apply to relationships with any person, or any officer or director of such person, from whom you, if a regular Government employee, would be prohibited by canons 16 and 17 from receiving a gift.

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[10] An illustration of some of the consequences of variant standards in this field, particularly the so-called "twelve-pound test" on the weight of acceptability of "Frank Prince, a recently ousted junior officer of the Reconstruction Finance Corporation investigation (New York Times, Sept. 18, 1951, p. 1, col. 4):

> "Frank Prince, a recently ousted junior officer of the Reconstruction Finance Corporation, admitted to a Senate investigating subcommittee today that he had accepted gifts in 1949 and 1950 from the head of the American Lithofold Corporation of St. Louis. The company obtained $645,000 in R.F.C. loans in 1949 after the R.F.C. board had reversed two decisions against aiding it.
>
> "The gifts, from R. J. Blauner, the president of American Lithofold, were listed by Mr. Prince as follows:
>
> "Boxes of fruit and other edibles. * * *
>
> "A turkey for Thanksgiving last year.
>
> "A small ham. He said there was nothing unusual about that. Asked about the propriety of accepting it, he stressed that it was a small ham and that he would 'stop at about twelve pounds.' "
>
> * * *

21. You shall not use or attempt to use your office or position with the Government to secure unwarranted privileges or exemptions for yourself or others, not provided by law; you shall not use the power of your office or the influence of your name to promote the business interests of others; and you shall not become indebted in any way to persons who are or who may be subject to your jurisdiction.

22. *Confidential Information.* You shall not disclose confidential information gained by you in the course of your public duties to any unauthorized person who can benefit from such disclosure, nor release any such information in advance of its authorization for release, nor shall you otherwise use such information for your personal interest, gain or benefit, or the personal gain or benefit of another.

23. You shall not engage, directly or indirectly, in any business or professional activity, or private arrangement for personal profit which accrues from or is based upon confidential information which you gained by reason of such official position or authority, or which will require you to disclose such confidential information.

24. You shall not seek, while a Government employee, to make money based on information or experience gained while so employed, and while serving the Government shall turn over all speaking writing fees to charity.[11]

25. *Business Transactions.* You shall have no interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, or incur any obligation of any nature, which is in substantial conflict with the proper discharge of your duties in the public interest; or is in violation of Section 3 of the Act.

26. You shall not invest, or hold any personal investment, directly or indirectly, in any financial, business, commercial or other enterprise which you have reason to believe may be directly involved in decisions to be made by you, or which otherwise will create a substantial conflict between your private interest and your public duty; or serve as a fiduciary under such circumstances.

27. *Disqualification.* If you possess or acquire such interests as might reasonably tend to create a conflict with the public interest, you shall immediately make a full disclosure in writing to the head of your agency, which shall be made a matter of public

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[11] New York Times, Mar. 7, 1961, p. 27, col. 8.

record, at any time such conflict becomes apparent, and shall disqualify yourself, under Section 3 of the Act, and the regulations.

28. *Outside Employment and Compensation.*[12] Public service in regular Government employment, ordinarily, is a full-time job and you shall not undertake outside employment without permission of your agency.

29. If you do have outside employment, you must not engage in any other business, transaction, employment or vocation while in office, or have a financial or other private business interest, direct or indirect, which is in conflict with the discharge of your official duties, or impairs your independence of judgment in performing those duties, or involves the use of confidential information obtained through your official position, or which is otherwise inconsistent or incompatible with your position, or would embarrass the service.

30. You shall not accept present or future employment with persons with whom you are currently dealing officially or with whom you might deal officially.

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[12] The unrestrained business initiative of some of our more imaginative public servants can lead to great financial rewards. A lucrative example of outside employment was revealed in the investigation of the Federal Alcohol Tax Unit (New York Times, Sept. 11, 1951, p. 1, col. 4, p. 21, cols. 2-3):

> "The former chief of the Federal Alcohol Tax Unit here admitted yesterday that he had solicited business for a St. Louis printing company from two New York liquor concerns while he held the office in which he exercised 'complete authority' over such companies.
>
> "James B. E. Olson, who resigned his $8,800-a-year job as district supervisor of the tax unit on August 24 after an inquiry into his official conduct was begun, made the admission from the witness stand in the Federal Court House before a subcommittee of the House Ways and Means Committee investigating administration of internal revenue laws.
>
> "The 56-year old former official said he received between $5,600 and 6,000 from the American Lithofold Company of St. Louis in 1949 and 1950 but did no work for them except to make two telephone calls to local companies. These he identified as the Jacob Ruppert brewery and Austin Nichols & Co., Brooklyn wine and liquor dealers, both of which subsequently ordered printing from the St. Louis company.
>
> * * *
>
> "'You were a partner in one company, paid well, performed very little service,' said Representative King. 'You were a vice president of another from which you received $6,000 for very little effort. Then, as a public servant, you spent only one or two hours a day in your office.'
>
> "The witness protested that despite a light schedule that permitted him to 'watch a ball game for a couple of hours' now and then, his 'executive ability' had vastly improved efficiency of the tax unit here.
>
> "'On the record, I'd say you have unusual business ability,' Mr. King remarked * * *."

31. You shall not discuss or entertain proposals for future employment outside of the Government by any person with whom you are transacting business on behalf of the United States.

32. You shall not assist another person for compensation in any transaction involving the Government, or assist another person by representing him as his agent or attorney, whether or not for compensation, in any transaction involving the Government, except as provided in Section 4 of the Act.

33. You shall not receive any thing of economic value, other than your compensation from the United States, for or in consideration of personal services rendered or to be rendered to or for the United States, except as provided by Section 5 of the Act.

34. *Judicial and Rule-Making Functions.* In performing your judicial functions, you shall avoid discussion of a matter with any person outside your agency and the staff while the matter is pending.

35. One of the prime causes for suspicion and distrust of official motives arises from excessive association with those regulated, or persons who come to you or your agency seeking official action. As a public servant, you should so manage your activities that associations of this type will not open you and your agency to public criticism. Thus you should not become unduly involved, through frequent or expensive social engagements or otherwise, with any person outside the Government with whom you transact business on behalf of your agency.

36. However, in the performance of rule-making and administrative functions, you have a duty to solicit the views of interested persons. Care must be taken by you in your relationships with persons within or outside of your agency to separate the judicial and rule-making functions and to observe their respective limitations.

37. Insofar as consistent with the dignity of your position, you shall maintain contact with the persons outside the agency who may be affected by your administrative or rule-making functions, and yet shall avoid unnecessary fraternization, and shall not accept unreasonable or lavish hospitality.

38. Generally, you shall not associate with such parties except in a public or official capacity to further the work of your agency, and representation of your agency to official functions will ordinarily be designated by the agency head, as an official matter.

39. *Qualification to Participate in Particular Matters.* You shall

not act in any official matter with respect to which there exists a personal interest incompatible with unbiased exercise of official judgment. The question of your qualification as an individual to vote or participate in a particular matter rests with you as an individual. You shall weigh carefully the question of your qualification with respect to any matter in which you or any relatives or former business associates or clients are involved. You shall disqualify yourself if you obtained knowledge prior to service of the facts at issue before you in a quasi-judicial proceeding, or in any other types of proceeding in any matter involving parties in whom you have any interest or relationship directly or indirectly. If an interested person suggests that you should disqualify yourself in a particular matter because of bias or prejudice, you shall be the judge of your own qualification.

40. *Conduct Toward Parties and Their Counsel.* You shall be temperate, attentive, patient and impartial when hearing the argument of parties or their counsel. You shall not condone unprofessional conduct by attorneys in their representation of parties.

41. *Ex Parte Communications.*[13] Matters of quasi-judicial nature should not be determined by you except upon the record in the proceeding and the arguments of the parties or their counsel properly made in the regular course of such proceeding. Except in circumstances authorized by law, if you are engaged in the decisional process as an agency member, hearing officer or employee, you shall not communicate ex parte with respect to such proceeding, directly or indirectly, with any party to such proceeding or any person acting on behalf of such party.

42. All communications by parties or their counsel to you in a quasi-judicial proceeding which are intended or calculated to influence your action should at once be made known by you to all parties concerned. You shall not at any time permit ex parte interviews, arguments or communications designed to influence your action in such a matter.

43. You shall not, in particular, entertain any ex parte communication in the form of political pressure, or requests originating from within the Executive or Legislative branches, concern-

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[13] This is hardly intended to serve as a substitute for the thorough statutory provisions of the proposed Independent Regulatory Agencies Act of 1961 (H.R. 14, 87th Cong., 1st Sess.) introduced by Representative Harris, prohibiting "off-the-record" communications in quasi-judicial proceedings, and providing criminal penalties. This is needed, and should be passed.

ing any case or other proceeding which is determined solely upon matters of record, unless that communication is also made a part of the record and every party at interest is given an opportunity to reply.

44. No ex parte communication so made shall be considered in the proceeding with respect to which it was made unless it shall have been duly admitted in evidence in such proceeding; violation of this canon by a litigant or anyone on his behalf shall be grounds for denying him relief.

45. Generally, and apart from hearings and quasi-judicial proceedings, if anyone outside asks you to take particular action as a Government employee, the safest course is to ask him to put it in the form of a letter.

46. *Opinions.* Opinions shall state the reason for the action taken and contain a clear showing that no serious argument of counsel has been disregarded or overlooked. In such manner, you show a full understanding of the matter before you, and avoid the suspicion of arbitrary conclusion. You shall be guided in your decisions by a deep regard for the integrity of the system which you administer. You should recall that you are not a repository of arbitrary power, but are acting on behalf of the public under the sanction of law.

47. *Judicial Review.* You shall recognize that your obligation to preserve the sanctity of the laws administered by you requires that you pursue and prosecute vigorously and diligently, but at the same time fairly and impartially and with dignity, all matters which you or others take to the courts for judicial review.

48. *Legislative Proposals.* You must recognize that changing conditions may require that you bring to the attention of the Congress proposals to amend, modify or repeal the laws administered by you. You shall urge the Congress, whenever necessary, to effect such amendment, modification or repeal of particular parts of the statutes which you administer. In any such action, your purpose shall be the common welfare and not the particular interests of any particular group.

49. *Investigations.* The power to investigate carries with it the power to defame or destroy. In determining to exercise your investigatory power you shall concern yourself only with the facts known to you and the reasonable inferences from these facts. You shall never suggest, vote for or participate in an investigation aimed at a particular individual for reasons of animus, prejudice

or vindictiveness, or tolerate the misuse of investigation for partisan reasons. The requirements of the particular case alone shall induce the exercise of investigative power, and no public pronouncement of the pendency of such an investigation shall be made in the absence of reasonable evidence that the law has been violated and the public welfare demands it.

50. *The Power to Adopt Rules.* In exercising rule-making power, you perform a legislative function. The delegation of this power by the Congress imposes the obligation upon you to adopt rules necessary to effectuate the stated policy of the statute in the interest of all the people. Care shall be taken to avoid the adoption of rules which seek to extend the power beyond proper statutory limits. The rules shall never tend to stifle or discourage legitimate enterprise or activities, nor shall they be interpreted so as unduly and unnecessarily to burden those regulated with onerous obligations. On the other hand, the very statutory enactments evidence the need for regulation, and the necessary rules shall be adopted or modifications made, or rules should be repealed as changing requirements demand it, without fear or favor.

51. *Organization.* You shall promptly perform the duties with which you are charged by statute and regulation. You shall examine continuously your practice and procedure to assure that your agency handles all matters before it promptly and efficiently, and in accordance with the Act and these canons.

52. *After You Leave the Service.* As a former Government employee you shall at no time subsequent to your Government employment assist another person, whether or not for compensation, in any transaction involving the Government—

> (1) in which you at any time participated during your Government employment; or
>
> (2) if such transaction involving the Government was under your official responsibility as a Government employee at any time within a period of two years preceding such assistance; or
>
> (3) if the regulation of your agency otherwise provides;

and as otherwise provided in Section 8 of the Act.

53. *General.* If you violate this Code, you are subject to the penalties defined in Section 10 of the Act, and possible criminal penalties. Ask first. The head of your agency is responsible for enforcement, and for answering any questions that may arise in his agency.

In What Manner Should the Code Be Implemented?

Having picked our way along that narrow path, strewn with instructive examples of the pitfalls for public servants that lie to either side (pitfalls, incidentally, that exist whether the path is well-marked, or not!), it must regretfully be agreed that there is no one solution to raising the standards of people in Government.

This does not mean that we must resign ourselves, on the one hand, to black pessimism; or, on the other, to the periodic choler of the throw-the-rascals-out school.—

The sensitivity of the public to current exposures of scandals bears out the applicability of John Galsworthy's remark in *Windows*,[14]

> "Public opinion's always in advance of the Law."

The first step, then, is to bring the Law up closer to public opinion, in the best sense of the term. This the proposed Executive Conflict of Interest Act does in an intelligent manner, and should be passed. Then can come the Code and regulations.

The implementation of the Act, and of the Code, depend in large part upon the people at the top, the President and agency heads.

It is the President's high responsibility to give leadership to the best impulses in Government service, and to inspire by his injunction and example that elevated standard of service the Act and the Code envision.

We must have strict enforcement of all statutes impinging on this field, including conflict of interest, the Hatch Act, and the Federal Lobbying Act. The late Senator Neuberger suggested publicity for outside income and other means of invigorating the sense of ethics in Government.[15]

The Bar Association survey has outlined, in Section 10 of the proposed Act, the suggested means of implementation, including an Administrator in the President's office, with power to assist, study and coordinate; and with the responsibility to each agency head to establish standards, issue regulations, and investigate.

Further, in Section 11, each agency head may use preventive measures, requiring the initial reading and signing of the regulations, as well as reports as to outside employment, and other aids to enforcement.

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[14] Act I (1922).

[15] Neuberger, R. L., *When Influence Is Good—and Bad,* New York Times, July 27, 1958, Mag. Sec. pp. 9, 23-25.

I would think, too, that periodic reminders, coupled with the use of effective printed material, and vigorous investigation of complaints, would be helpful. Further, an information service for the public helps dispel much of the Governmental mystery that spawns the Grunewalds. Beyond that, perhaps, citizens' advisory committees on ethical standards would help.

The Bar Association survey recommended civil penalties, including treble damage suits, against public employees who violated the Act, and those outside who profited in helping employees violate their trust.[16]

Professor Lenhof has already written of the increasing use to which the equitable doctrine of the constructive trust is growing in this field.[17] The truism that public office is a public trust may have future unpleasant potentialities, as yet unrecognized, for some of our present officeholders.

Public officers and employees may well, eventually, be truly held to a civil standard of fiduciary duty.—

This concept could invigorate the entire range of the conflict of interest statutes and codes of ethics, nationally as well as locally, for the legislative as well as the executive, as a supplemental means of enforcement; and it is a logical extension of an existing body of equitable principles to the public field.

Without unduly discounting this weapon against official misconduct, however, I do not think of the constructive trust based on unjust enrichment as the principal answer here to official wrongdoing, since the treble damage suit recommended by the Bar Association survey, under the proposed Act, will be far more effective.

From the long range point of view, too, there is no substitute for personal merit and integrity; while statutes and regulations and Canons help, in the final analysis we must look to the Man and not the Rule.

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[16] The Association of the Bar, *op. cit. supra* note 1, at 246, 303.

[17] Lenhof, *The Constructive Trust as a Remedy for Corruption in Public Office,* 54 COL. L. REV. 214 (1954); *cf.* Reading v. Attorney-General [1951] A.C. 507; Jersey City v. Hague, 18 N. J. 584, 115 A.2d 8 (1955; dissent); also United States v. Carter, 217 U.S. 286 (1909); Boston v. Santuosso, 298 Mass. 175, 10 N.E.2d 271 (1937); Boston v. Dolan, 298 Mass. 346, 354, 10 N.E.2d 275, 281 (1937) and cases cited; City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913); 65 HARV. L. REV. 502 (1952).

THE ETHICS PROBLEM, THE ADMINISTRATOR AND THE NON-LAWYER PRACTITIONER

By John A. Rowe, Jr.*

In Volume 79, Reports of American Bar Association for 1954, its Committee on Unauthorized Practice of Law, in discussing the then latest draft of the Administrative Practitioners and Ethics Bill, at page 299, made the following significant statement:

> "One of the provisions of the bill has to do with the disciplining of those engaged in administrative practice. It is thought that all these individuals should be regulated by the Canons of Ethics of the American Bar Association. It has been the position of this Committee and the Section of Administrative Law that it is in the public interest to have all Administrative Practitioners, whether lawyers or laymen, bound by the strictest ethical standards and thus eliminate influence peddling and other types of chicanery which have plagued administrative practice in the past.
>
> "This is not a lawyer's bill, it is a bill for the public. It seeks to guarantee to each individual the best possible representation and thus to provide administrative agencies with practitioners who are not only qualified but who are bound by strict ethical standards for the breach of which they may be censured or suspended."

The purpose of submitting this quotation is first to provide the usual statement of the problem, but of greater importance this statement reveals two assumptions believed to be contrary to fact but usually indulged by lawyers considering the subject.

The first assumption is that by extending to nonlawyer practitioners the lawyer's ethical standards their clients will be "guaranteed the best possible representation." The second is that staff members require no ethics code to guide them.

Most unprejudiced minds should concede that a lawyer with his academic background in law and his training in advocacy should be better able to assist a client than an expert in some other specialized field. In courts these specialists assist with their expert opinions introduced under the skilled supervision of lawyers.

Usually experts such as physicians, accountants and engineers offer great resistance to effective questioning at trials. This is due to ignorance of essential trial procedures and inability to comprehend lawyer's objectives. The propounding of unobjectionable questions is a matter requiring skill and adroitness. A lawyer is an expert in the art of trying cases. How can it be blithefully assumed that a doctor can suddenly take over this alien skill of introducing evidence? Quasi courts may not so rigidly adhere to strict rules of evidence yet objections will be made and a knowledge of the rules will always help in making and resisting objections or motions to strike. The fact that the strict rules of evidence are not necessarily applied actually intensifies the problem. This is explained by Circuit Judge Allen in her opinion in *Powhatan Mining Co.* v. *Ickes,* 118 Federal 2d 105 (6th Circuit, 1941) as follows:

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> "The practical application of this rule is emphasized in this case. The exhibits are admissible under the broad rule that Administrative Agencies are not bound by the ordinary rules of evidence. All the more scrupulous should be the effort on the part of the Agency to extend to the litigant the right to test evidence thus admitted by the fullest possible cross-examination."

Fortunately doctors are dedicated to their own work and grudgingly appear before courts and administrative bodies. This reluctance however is not shared by many other expert witnesses. Former Commission employees in increasing numbers are not only opening offices where they offer themselves as consultants and expert witnesses, but are also actively engaging in the practice of law before administrative agencies.

The preferable ethical rule to apply to nonlawyers in my opinion would be a rule of exclusion rather than one of regulation. This position is amply supported by the excellent article of Professor Wallace R. Bennett in the July 1960 issue of the American Bar Association Journal and the decisions he cites, especially *Ginsburg* v. *Kovrak,* 392 Penn. 143, and *Matter of Wasserman,* 240 Fed. 2d 213.

Before the California Public Utilities Commission, and I imagine most other such commissions, these practitioners are most objectionable because they appear at hearings, or more typically before hearings, and by protestations of ignorance and confusion (more often real than feigned) solicit the aid of Examiner or staff member who, out of sympathy for the man's client, lets himself become an unconscious partisan. In introducing evidence these practitioners are most ineffective, frequently becoming confused as to whether they are testifying or asking questions of witnesses.

As Professor Bennett indicates, many federal agencies encourage nonlawyer practitioners. So far the number appearing before State agencies is not excessive. Labor Code (Section 5700) permits others than lawyers to appear before the Industrial Accident Commission of California. However, such appearances have been made only in simple cases and by representatives related by blood or those assisting claimants who cannot properly express themselves.

Many Public Utilities Commissions have not been so fortunate. The presumed authority of nonlawyers to appear before the California Public Utilities Commission is contained in Rule 1 of its Rules of Practice and Procedure. This rule entitled "Code of Ethics" provides:

> "Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission and to hearing officers; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

This rule which is typical of rules in many states was drafted to permit small utility corporations to appear by the manager or sole stockholder and thus substantially the man would be representing himself. Other instances include the president or manager of a Chamber of Commerce, Farm or Labor organization appearing in proceedings essentially legislative in character. However, more recently a substantial number of nonlawyers have made it a large and increasing part of their business to represent highway common carriers and others in all types of proceedings, both judicial and quasi-judicial. Some have become serious competitors of lawyers for this lucrative business.

Rule 1, although ambitiously entitled "Code of Ethics" falls far short of accomplishing any desirable objective. This merely forbids misleading the Commission by artifice or false statement of fact. Lawyers are forbidden by their own Code of Ethics to do this and also among other forbidden acts, to solicit business. But nothing prevents these practitioners from actively going after legal business. They may claim that they have inside contacts enabling them to procure for prospective clients more than a lawyer can by his open approach.

Moreover, this meager Code of Ethics can be enforced only against members of the bar. State Bars enforce compliance by disbarment of members in aggravated cases and suspensions in other cases. Since these practitioners belong to no organization charged with disciplinary powers the present codes, without penalty provisions, cannot be effectively enforced against them. Any Code of Ethics should cover all who are permitted to appear in a representative capacity before such boards. The provisions of such a Code should have for one of their major objectives the exclusion of all nonlawyers except those who are in substance representing their own interests or necessarily appearing for groups in legislative proceedings. Perhaps this could most effectively be done by forbidding nonlawyers collecting any fees for their services.

It would appear that it has now been proved that nonlawyers, if permitted to practice, should be bound by the same ethical standards as lawyers. No additional arguments appear to be required to demonstrate that if such a code is to be enforced equally it must be accomplished by the imposition of penalties. These penalties must be written into the Code itself and the Code must be a part of enforceable legislation imposed by the State or Federal Branch of Government.

The next objective will be to demonstrate that the members of the staff of a Commission are in a very true sense parties, and that consequently any Code of Ethics should apply to them. Because their duties are statutory the enforcement of any such Code as to them will be found to present unique problems and will require special treatment.

It has only been within the last few years that as a result of a study made by the Attorney General, extensive reforms in procedure have been made applicable to federal administratitve agencies. Many statutes similar to the Federal Administrative Procedure Act have been adopted by the various states. The Administrative Procedure Act of California applies to most state boards and commissions, but applies to the Industrial Accident Commission and to the Public Utilities Commission only in the adoption of General Rules.

The objective of these State statutes is to accord all parties a more exact compliance with due process of law in the constitutional sense. The Industrial Accident Commission is thus required to accord the parties substantial due process of law. As to that Commission this is accomplished by specific legislative enactments as to procedure within the Commission itself. The Legislatures, however, have seen fit to impose no such restrictions upon most Public Utilities Commissions. Section 22 of

Article XII of the California Constitution even seems to suggest that legislation directed to that Commission should not have for its objective, any limitations. This suggestion is contained in the provision that the Legislature is given plenary authority to confer on this Commission any additional powers but "unlimited by any provision of this Constitution." The State Constitution forbids the taking of property without due process, consequently any powers conferred on this Commission are to be unlimited by any requirement of due process of law, one of the requirements of other provisions of the State Constitution.

This is probably no more than a suggestion and should not be considered a binding restriction on legislative authority. A similar provision applicable to the California Industrial Accident Commission (Art. XX, Sec. 21 of the State Constitution) has never been considered as or held by the courts to be a constitutional restriction upon the Legislature. However, even assuming it to be such a restriction it only purports to restrict the Legislature's vesting power on the Commission. Consequently, the imposition by the Legislature of a Code of Ethics upon the Commission staff, as distinguished from restrictions upon the Commissioners, could be accomplished without any substantial Constitutional hazards.

The California Public Utilities Commission was created by a Constitutional amendment at the instance of Hiram Johnson chiefly, as with most such agencies, as a means of curbing the then growing power of railroads. It was generally felt that this could best be accomplished by vesting power in this group unlimited by any other provision of the State Constitution. Therefore, any limitations on its power must come either from the Federal Constitution or from the State Legislature. At present about the only legislative restriction imposed upon Commission action consists of a requirement that the sessions of the Commission shall be public (Section 306 Public Utilities Code) as well as provisions requiring a public hearing before Commission action.

Many administrative bodies are created primarily to regulate certain phases or sections of industry such as public utilities and public carriers. Many Commissioners and many of the members of the different Commission divisions are not lawyers. Also, it cannot be assumed that because a man is a member of the State Bar he is necessarily fired with a crusaderlike desire to see that all parties are given due process. It must be remembered that the requirements of due process have been forced upon administrative bodies in many states only by the Federal Constitution.

Mr. Chief Justice Hughes, speaking for the Court, in *Morgan* v. *United States,* 298 U.S. 468 (1936) laid down minimum requirements of due process. These essentials were further expounded in *Morgan* v. *United States,* 304 U.S. 1 (1938) but the denouement of this leading case is rather disappointing in view of the Court's casting a blanket of immunity about the Secretary's so-called mental processes since his work is considered essentially judicial in nature and because of a presumption of official duty being correctly performed. *United States* v. *Morgan,* 307 U.S. 183.

It would seem since the United States Constitution guarantees parties even before administrative bodies a minimum of procedural due process, that in reviewing such decisions appellate courts should learn the actual procedure followed in the case under consideration, at least the procedures and steps taken by the staff.

The minimum requirements of due process are thus stated by the Chief Justice in the first Morgan case:

> "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon the evidence has conscientiously reached the conclusions which he deems it to justify. *That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."* (Emphasis added)

This is logical and reasonable and surely gives the parties vital procedural rights. Some state courts have upheld Commission decisions where a referee so required by statute has heard a matter and prepared a decision and the Commissioners have adopted it without study on their own behalf. This court has further suggested that another referee, after studying the transcript, may prepare a contrary decision which will be upheld if adopted by the Commission. See *Hohreiter* v. *Garrison,* 81 Cal. App. 2d 384; *Taylor* v. *Industrial Accident Comm.,* 38 Cal. App. 2d 75.

But place yourself in the shoes of a party deprived of a permit or other source of livelihood. He may be satisfied that evidence of record supports his position although there may be evidence to the contrary. He has attended a Commission hearing and now the adverse decision has been rendered. The head of the department involved is expected and required by the Commission to approve or suggest changes in the draft of decision; but how can the parties learn, even less prove, that new arguments were advanced or that new testimony was rendered before or at the Commission conference.

The United States Supreme Court has held that utilities are entitled to know the evidence upon which their rates were fixed. *Ohio Bell Telephone Company* v. *P.U.C. of Ohio,* 301 U.S. 292 (1937). A common form of secret evidence includes investigations made but not released to the parties for examination and rebuttal. The Ohio Bell case held such use of evidence violated the United States Constitution. Under a Minnesota statute the Commission's medical board was required to hear the parties and witnesses and submit a report with the names of witnesses, but not a transcript of their testimony. On appeal the Court held the statute unconstitutional because the lack of transcript made effectual review impossible. *Hunter* v. *Zenith Dredge Co.,* 220 Minn. 318 (1945). See also *Meunier's Case,* 319 Mass. 421 (1946). Most assuredly the Courts should give the same treatment to evidence submitted secretly by the staff. The only difference is that it is more difficult to prove the existence of the latter irregularity.

The practice followed by many Commissions contemplates preliminary draft by the hearing examiner, but where not otherwise required by statute it is regularly routed to the departments involved for approval or suggested changes. It is not unusual for the staff to prepare contrary drafts where disagreements exist. Only the decision as signed remains a part of the official file and consequently available to the parties for inspection. All unapproved drafts and proposed changes are considered preliminary and need not be preserved. The Commissioners cannot ever be questioned concerning their "mental processes" and the intentions of the staff to influence or not to influence Commissioners would not constitute relevant testimony at the time of hearing.

Any Code of Ethics applicable to administrative agencies, if expected to accord due process, must therefore have for its purpose the isolation of the hearing officer and his proposed draft of decision until and during the time the Commissioners receive and act upon it.

The federal agencies, by the Administrative Procedure Act, have been placed in a position where by following statutory procedure the parties will probably be accorded procedural due process. Similar statutes, as previously stated, have accomplished this result with many state agencies. Under this legislation any staff efforts to influence the decision will be made with the knowledge that the act is improper.

However, there remain some state agencies where little or no legislative progress has been made to reform internal procedure. Extensive powers are conferred, but these agencies are left to their own devices in providing for internal procedure. Their Rules of Practice and Procedure refer only to how parties shall proceed. There are no Commission rules limiting the staff, as such. Staff members are usually forbidden from testifying as to Commission records which are not open to public inspection and as to all such official business of the Commission. General Order No. 66-A, of the California Public Utilities Commission.

A little study of the ordinary staff functions will reveal, however, that the members have very definite ideas and desires as to how most matters are to be decided. Since they are working for the Commission it is natural for them to attempt to persuade Commissioners to decide cases in accordance with their views, especially since the regular procedure followed requires them to approve decision drafts or suggest changes. These efforts deprive the parties of due process only if their recommendations contain new evidence, are adverse to the moving party and actually have the effect of improperly persuading the Commissioners. This means that the impropriety of their action will ultimately be manifest only to a Justice of the Supreme Court in reviewing Commission action who has all these facts before him. With this in mind, the impropriety of the reviewing Court's applying to this situation the presumption of official duty being properly performed, becomes apparent.

Let us take a few typical examples of how staff members work in order to understand their attitudes and wishes. The principal function of the Commission is to study the tariff or rate structure of utilities and common carriers. Since company books are the best and about the only possible source of information it is incumbent upon the staff to send men to audit such books. Also, when a rate or fare increase is sought these men will try to work out some area of agreement. This is perfectly proper and is a great aid to the Commission. However, it does have the effect of making them advocates for at least the points of agreement. As a result at or after any hearing these men will oppose any consumer effort to undercut such areas of agreement. This opposition can most effectively be made by expressing views and arguments to Commissioners after the hearing, but without giving the opposing party an opportunity to cross-examine or advance counter arguments. In fact the principal advantage of making an argument to a Commissioner after the hearing is that thereby the opposition cannot advance counter arguments.

Staff members assigned to regulating railroads, on the other hand, may tend to become advocates of so-called "state's rights." This is a more recent development and arises from the fact that while the staff is charged with the general duty of regulating railroads, their authority is restricted to intrastate functions. A railroad, for instance, will seek a fare or tariff increase as to its intrastate operations. If the railroad fails before the State Commission it goes to the Interstate Commerce Commission with the assertion that the local board is keeping the rates so low as to impose a burden on interstate commerce. Regardless of the outcome, the staff member can reasonably be expected to have feelings of resentment and frustration which will consequently put him in antagonism with the railroads in almost any of their future applications.

The staff's contact with truckers is normally while they are engaged in enforcing safety or other regulations. These officers find that some will cooperate with them and some will not. Therefore, in their eyes some are good and some are bad. Naturally during or after subsequent hearings they will wish to help those they consider good but try to punish the bad.

This help or this hindrance, if it is to be given, should be presented at the hearing where it can be answered and put in proper perspective. It has been said that since the staff contains the experts, the Commissioners should have their expert advice as an aid to rendering decisions. No opposition is taken to this contention. The only comment which occurs is that if such expert advice is to be given it should be given at the hearing. The parties can point out errors in judgment or show how the opinion is not pertinent if it is in the form of evidence presented in open hearing. However, if the parties do not know about the evidence it may be given weight all out of proportion to its actual value. The California Supreme Court has held that the receipt of evidence without permitting an opportunity of cross-examination invalidates the decision. *Holmes-Eureka Lumber Co.* v. *I.A.C.* 41 Cal.

App. 2d 150. Consequently, it becomes obvious that any Code of Ethics must apply to the Commission staff.

As to the manner of implementing such a Code, it would seem that it has now been demonstrated that such a Code should be enforced by sanctions with a substantial sting. As previously stated the only legislative curb on many Public Utilities Commissions is the requirement that their meetings be public. The obvious justification for enacting such legislation was that thereby the public, including the parties, would be in a position to observe and learn something about the methods followed by the Commissioners in reaching their decisions. Be that as it may and even though there were no logical justification for the legislative requirement, it would seem that all Commission meetings should have been open to the public. However, at least during the last twelve years, no public meetings have been held by one particular Commission which has this statutory provision. Furthermore, this Commission has an unpublished rule which forbids most staff members attending. Ironically, the reason stated for this rule is that the conference room is too small to permit the attendance of other than department heads and their chief assistants. This permits the attendance of those staff members most interested in the outcome, but excludes all those who most probably heard the evidence.

With this background it is obvious that all such Code restrictions will similarly be disregarded unless accompanied by a sufficient penalty to make it more desirable to follow the Code than evade it. The Code should also contain specific provisions authorizing their proof and stating how violations may be revealed. The presumption that official duty has been properly performed should be limited to the Commissioners' own thoughts and not include acts of subordinates. Where, as here, a regular course of conduct has become established the courts should not assume that a different conduct is actually followed. Consequently, a section denying any privilege of Commission personnel when thereafter called to testify as to communications made or procedures followed, should be included.

Section 1757 of the California Public Utilities Code which deals in the usual manner with judicial review of Commission decisions provides that:

> *"No new or additional evidence may be introduced in the Supreme Court,* but the case shall be heard on the record of the Commission as certified to by it. The review shall not be extended

> further than to determine whether the Commission has regularly pursued its authority, *including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States* or of this State. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination." (Emphasis added)

Assume a situation where the evidence introduced at the hearing is in conflict on every issue. In other words any decision made by the Commission would have sufficient evidence to support it. However, the actual deciding factor is the testimony of the head of the department concerned with the supervision of the utility which is a party. This testimony is not now a part of the official record because it was given to the Commission by the department head at the conference when the decision was considered and signed by the Commissioners.

In certifying the record to the Supreme Court should a writ of certiorari be sought, this opinion or advice of the department head would not be included. The losing party, so far as is apparent, would never know about this evidence and if he learned of it he is in no position to show its existence to the Supreme Court. That is unless some provision in a Code of Ethics would have that effect.

A Code provision should therefore forbid any secret contact by members of the staff with Commissioners in an effort to influence their decision. A further provision which would effectively prevent such indirect efforts to influence Commissioners would be a requirement that every time they sign a decision the Commissioners must certify under penalty of perjury that their decision was not based upon any evidence dehors the record except as they should explicitly otherwise state.

In the absence of some such Code of Ethics provision the only way to take advantage of staff efforts resulting in a deprival of due process of law would be injunctive relief in a Federal Court. A plain, speedy and efficient remedy is not now provided in the State Court because no method is provided for providing this indirect influence. Therefore, the Johnson Act of 1934, 48 Stats. 775, now 28 U.S.C. Sec. 1342, should not apply and deprive the courts of this jurisdiction. This Federal proceeding would probably also prove futile because of practical difficulties of proof and the undesirability of affronting Commissioners in the official performance of their statutory functions. Even the Federal discovery procedure would seem to be inadequate for this task, under present State laws.

The imposition of such a Code requirement will probably be resisted by most Commissions. It will be argued that a Code of Ethics should not include provisions applicable to Commissioners. Also, it will be contended that this imposes unnecessary burdens upon already over-worked Commissioners. Neither of these arguments should prevail. It is conceded that a Code of Ethics should not restrict Commissioners. The requirement would be imposed on Commissioners merely as the most effective means of compelling compliance by the staff.

The burden thereby cast on Commissioners will actually not prove to be substantial. As soon as staff members learn that such contacts with Commissioners are not proper and not desired they will cease being made. Such contacts are now made because long established procedures contemplate and welcome them. The staff would freely agree with the proposition that all official duty should properly be performed. The only point of disagreement arises when it is suggested that there is anything improper in following the usual procedure.

In those jurisdictions where the Hearing Officer prepares the decision and it becomes the Commission decision, unless reconsideration or a rehearing is granted by the Commission, the certificate of no improper contact should be required of the Hearing Officer rather than of the Commissioners.

In summary, we conclude that in drafting any Code of Ethics applicable to Administrative Agencies its requirements must be made to apply to all active parties and their counsel. The phrase "active parties and their counsel" must include nonlawyer practitioners permitted to appear and all staff members of the Commission or Board involved. In extending provisions to others than members of bar associations, effective means of enforcement must be added. The method of self punishment of lawyers is inapplicable to others. Consequently, there arises this need of effective enforcement. As applied to staff members enforcement will continue to be impractical without provisions looking to easing the search for improprieties and their proof. With such provisions the procedures before Administrative Agencies will be materially improved to the end that the parties will thereby be accorded substantial due process of law in the constitutional sense.

MINUTES OF COUNCIL MEETING

WASHINGTON, D. C.

DECEMBER 16-17, 1961

The Council of the Section of Administrative Law, American Bar Association, met on December 16-17, 1961, at 1625 K Street, Washington, D.C.

Attendance: All officers, the Section Delegate and all members of the Council were present, except Frank E. Cooper and Mark Martin, who were unavoidably absent.

I. AGENDA

The agenda for the meeting was approved, as distributed.

II. APPROVAL OF MINUTES

The minutes of the 1961 annual meeting of the Council and those for the mail vote taken in September 1961 were approved, without change.

III. ANNOUNCEMENTS

Raoul Berger, chairman of the Section, reported briefly on the status of the work of the Section. He made particular reference to the Treasury Committee and the relationship of its jurisdiction to that of the Tax Section.

IV. ABA'S SPECIAL COMMITTEE ON RECOGNITION AND REGULATION OF SPECIALTIES IN LAW PRACTICE

There was extended discussion of the question of specialites in the field of law, it being pointed out that the suggested analogy with the American Medical Association and its specialization groups is not a valid one. Whitney Harris moved that the Section chairman appoint an ad hoc committee on recognition and regulation of specialization in the field of administrative law for the purpose of reporting to the Council on (a) the feasibility of specialization in administrative law, (b) the basis upon which present practitioners may be recognized in the field of administrative law, and (c) the criteria for specialization in the field of administrative law. The motion was seconded by Earl W. Kintner, and adopted.

V. Regional Meeting

After some discussion of financial matters, Donald C. Beelar expressed the view that if a worthwhile program can be arranged, we should not worry about the expense of participation in the Regional Meeting. Richard Keatinge agreed expense is not the criterion and that he feels participation in the Salt Lake City Regional Meeting is a most worthwhile project, and that people in the area want to hear from someone in Washington. Jesse E. Baskette moved that the Administrative Law Section participate in the Salt Lake City Regional Meeting in May 1962. The motion was seconded and adopted.

VI. Annual Meeting

Chairman Berger stressed the importance of greater participation by committee chairmen in the program at the annual meeting of the Section. It was the consensus that Council meetings should be shorter and Section meetings longer. Mr. Beelar reminded that committee reports are made to the Section and not to the Council and that dual reporting is not good. Frederic L. Kirgis referred to the conflicts which exist with meetings of other Sections.

After some discussion as to the necessity that reports of committees be (1) in writing and (2) submitted in time for publication in the Administrative Law Review, Fanney N. Litvin moved, seconded by Mr. Kintner, that no committee chairman shall be permitted to report orally to the Council or Section unless he first shall have submitted a report in written form. Mr. Harris expressed opposition to formalizing the action. John B. Gage offered as an amendment to the motion the addition of the words, "unless by special permission of chairman of Section." The amendment was accepted by Mrs. Litvin and Mr. Kintner. Thereupon, the motion, as amended, was adopted.

It was agreed that discussion of controversial topics, with reasonable time limitations, are important and will be of wide interest to members. It was the consensus that Council meetings should be made shorter, (1) by having the Council consider only such matters as require action by it and (2) by submitting all other reports to the Section for consideration, with appropriate time limitations. It was also agreed that it is important to schedule consideration of particular reports at specific times. Mr. Keatinge agreed to aid in formulating the program for consideration of committee reports by Section.

The question of speakers at the annual meeting of the Section was discussed and several potential speakers were agreed upon, including a speaker from one of the independent agencies and the Departments of Defense and Interior. The importance of Maritime matters to the San Francisco area was mentioned and the suggestion made that thought might be given to inviting a participant from that field. It was also suggested that a speaker with expertise in the field of state administrative law should be considered.

Participation with other sections was discussed. It was further agreed that two luncheons could be held, if necessary—particularly if joint sponsorship with another section or sections could be obtained for one or both. The matter will be explored by Mr. Berger.

VII. Midyear Meeting

Mr. Beelar inquired whether the December meeting is an official meeting of the Section and was advised in the affirmative. He then moved that the expenses of the out-of-Washington members be reimbursed. The motion was seconded by Mr. Deale. Messrs. Harris, Kirgis, Keatinge and Gage stated that they had come to the meeting with the expectation that their expenses would not be paid by the Section, and had made arrangements accordingly. Mr. Harris thereupon moved that the Beelar motion be tabled. The motion to table was seconded by Mr. Keatinge, and adopted.

After some discussion of the trials and tribulations often encountered in obtaining action by the House of Delegates on matters considered by the Council at the Midyear meeting, consideration was given to holding the Midyear meeting of the Council in December rather than February. Mr. Beelar thereupon moved that no meeting of the Council be held in February 1962 at the Edgewater Beach Hotel in Chicago. Mr. Harris seconded the motion. Mr. Keatinge reported that the Council of the Tax Section will hold its meeting in early February outside of Chicago. Mr. Kirgis suggested early January rather than December. After further discussion, the motion was amended to read as follows:

> "It is moved that no meeting of the Council of the Section of Administrative Law be held in February 1962, at the Edgewater Beach Hotel, in Chicago; that this meeting (Special Council Meeting of December 16-17, 1961) be declared the official midyear

1962 meeting; and that a second meeting be held in May 1962 at such place as the chairman of the Section may designate."

The motion, as amended, was adopted. Mr. Beelar later suggested that the chairman give consideration to scheduling the May meeting of the Council in Salt Lake City at the time of the Regional Meeting.

VIII. ESTABLISHMENT OF DIVISIONS WITHIN SECTION

1. *Amendment to By-Laws of Section to Permit Establishment of Divisions and Increase Dues*

Bernard J. Gallagher moved that the Council recommend to the Section the adoption of a resolution requesting approval by the House of Delegates of the following amendments to the By-Laws of the Section:

(1) Amend Article I of the By-Laws of the Administrative Law Section by adding the following:

> "It shall have such Divisions and Committees as shall be authorized from time to time by the Council."

(2) Amend Article II of the By-Laws of the Administrative Law Section by changing the words "Five Dollars" to "Eight Dollars."

The motion was duly seconded and adopted.

2. *By-Laws for Divisions*

(a) Mr. Gallagher then moved the approval of the attached By-Laws (Appendix A) for the Public Contracts Division of the Section of Administrative Law, subject to approval of the foregoing enabling amendment to the By-Laws of the Section by the Section and the House of Delegates. The motion was seconded by Mr. Harris, and adopted.

(b) Mr. Kirgis thereupon moved that the same form of By-Laws be approved for the State Administrative Law Division of the Section of Administrative Law. The motion was seconded by Mr. Keatinge, and adopted.

IX. ESTABLISHMENT OF NEW COMMITTEES

1. *Policy Planning Committee*

Mr. Berger outlined the emergency need for establishment of a new committee on policy planning and the action taken by him to meet that need. Jesse E. Baskette moved that the establishment of the Committee on Policy Planning be ratified and approved. The motion was seconded by Mr. Keatinge and adopted.

2. *Screening Committee*

After some discussion of the problems involved, Mr. Keatinge moved that the authority for the establishment of the Screening Committee be rescinded. Mr. Kintner seconded the motion. Mr. Deale opposed the motion, pointing out the need for updating of resolutions and the concurrent need for screening or liaison. Roger Nelson pointed out that reports had been and were being submitted to the Policy Planning Committee and he had thought the matter was already crystallized. Mr. Baskette emphasized the necessity for uniformity of treatment by all committees and agreed to undertake personally the task of such coordination. Mr. Kintner thereupon moved to amend the motion to name Mr. Baskette as coordinator of the recommendations of the various committees relative to action needed with respect to outstanding resolutions of the ABA pertaining to the Administrative Law Section. The motion, as amended, was adopted.

3. *Committee on Patents*

After discussion of wide interest in the subject, Mr. Harris moved that a Committee on Patents be established. The motion was seconded by Mr. Kintner, and adopted.

X. Procedure for Other ABA Sections and Committees in Considering Subjects in the Field of Administrative Law

There was discussion of the need for reciprocity in furnishing information as to action proposed by so-called substantive sections and committees of ABA relative to matters in the field of administrative law—in line with a proposal made by Mr. Beelar and distributed to Council members. Mr. Harris moved that the proposal made by Mr. Beelar be approved. The motion was seconded by Mr. Keatinge and adopted. The text of the resolution reads as follows:

> "*Resolved,* That the Administrative Law Section recommends that the House of Delegates, upon the concurrence or approval of the Board of Governors, adopt the following resolution:
>
> '*Resolved,* That the House of Delegates herewith adopts the following standing rule of procedure governing consideration of reports of Sections and Committees which contain action recom-

mendations on matters of procedure and practice before administrative agencies of the Federal Government, namely,

> '(1) Each report of any Section or Committee, other than the Section of Administrative Law, which contains in whole or in part any action recommendation on matters of procedure or practice before an administrative agency of the Federal Government, shall state that the text or substance of such recommendation has been referred to the Section of Administrative Law for its concurrence or comment, and the Section of Administrative Law shall be afforded an opportunity to state its position on each such recommendation prior to its consideration by the Board of Governors or the House of Delegates;
>
> '(2) When a report of the Section of Administrative Law contains an action recommendation which has application to the procedure or practice before a particular federal agency in a field of law which is within the jurisdiction of any other Section or Committee the report shall set forth that the text or substance of such recommendation has been referred to the interested Section or Committee concerned for its concurrence or comment, and it shall be afforded an opportunity to state its position on each such recommendation prior to its consideration by the Board of Governors or the House of Delegates.
>
> '(3) In the event a difference of opinion arises between the Administrative Law Section and any other Section or Committee involving any such matter of federal administrative procedure or practice, the Board of Governors' report to the House of Delegates shall include a statement of the issue and its recommendation, if any, thereon.' "

XI. APPROVAL OF EXPENDITURES

Mr. Kintner moved that a two-year contract for purchase of paper for the Administrative Law News be approved and payment in the amount of $1,014 be authorized during the current year. The motion was seconded by Mr. Harris and approved.

Mr. Kintner also moved that purchase of reprints of an article by Professor Miller on "Public Interest" be approved in the amount of approximately $26.00. The motion was seconded by Mr. Keatinge, and adopted.

XII. MEMBERSHIP COMMITTEE

Mr. Kintner reported on the work of the Membership Committee and, particularly, of the need to interest members of the

Junior Bar. He then moved that the chairman be authorized to request, on behalf of the Section, permission to extend an invitation to membership in the Administrative Law Section to all members of the Junior Bar Conference, and, in the event the ABA grants such permission, to extend such invitation. The motion was seconded by Mr. Keatinge, and adopted.

XIII. CONFERENCE ON ADMINISTRATIVE PROCEDURE

Mr. Nelson, chairman of special committee on the conference, discussed briefly the draft bill prepared by his committee at the direction of the Council and Section. The fundamental question of whether we should ask the House of Delegates to reconsider action was raised by several Council members. Mr. Beelar raised the question of how best to proceed, *i.e.*, whether to go through draft of bill, section by section, and reserve question of reconsideration or to take up reconsideration as first order of business. Mr. Keatinge urged reconsideration as first order of business. There was a general discussion of the present Conference on Administrative Procedure and its probable results. Several expressed disappointment—and more—at the thinking exemplified in the Conference, and it was the view of many that the Section cannot be a party to present attitude of the Conference. Mr. Beelar reminded of the joint responsibility of the Committee on Legal Services and Procedure and the Administrative Law Section and expressed the view that Mr. Nelson should have an opportunity to present the result of the great deal of work done by his committee. Mr. Kintner shares some of the misgivings expressed, but not all of them; he feels that some good will come of conference—that the studies and collection of data under way are plus factors. Mr. Baskette expressed the view that we should take the leadership, since a permanent conference, in his view, is inevitable. He favors going through proposed bill. Mr. Harris stated that he feels we were right in initially endorsing idea of conference, which had the blessing of the Judicial Conference, but is now worried about permanent nature of conference as a quasi-agency of the United States Government, and feels that we should not now sponsor establishment of such conference—that we should continue to support an independent office of administrative practice and procedure. Mr. Baskette expressed the view that a conference is not a substitute for an office of administrative procedure or the other proposed legislation which the ABA has under way. Mr.

Beelar agreed with Mr. Harris and stated that the conference is a "well-heeled machine", expending taxpayers' money. Mr. Deale said that he is quite troubled about the decision of sponsorship of the conference and if we had our choice we might not sponsor it; but that, if it is inevitable, we should keep a watchful eye over it and it would be a mistake to simply rescind prior action of sponsorship without some substitute proposal.

Mr. Berger relinquished the chair to express his individual views; expressing doubt as to the effectiveness of the conference and opposing sponsorship by ABA, in view of present and probable future composition. Mr. Keatinge expressed the view that one of the vices of legislation is that it would freeze the conference into permanency and that it should be a periodic procedure only. Mr. Kintner reminded that he had opposed the legislative approach. Mr. Baskette feels that we should not be swayed by action at one session of the conference. Mr. Kirgis expressed the view that there is no point in middle ground; that we should not propose and assist in legislation for permanent conference made up primarily of government people. Mr. Nelson reminded that his committee is functioning as technicians under mandate to draft legislation, but that he does not sense such dire consequences as have been expressed by others; and that the legislation should not be considered as the "be all and end all" of the subject. Mr. Rea said that we had originally convinced ourselves, and thereafter the House of Delegates, that this would be a useful tool and that he has not changed his personal view that such could be the case and feels that it must be by legislation. Mr. Gallagher expressed concern that the conference would become another agency of bureaucracy. Mr. Gage stated that when it was originally considered, it was supposed that the membership of the conference would afford at least representation for the public on a 50-50 basis and that he is worried about creating a governmental front against reform. Mr. Beelar referred to his committee and expressed the view that good can come from dissent; that without a dissent the proposal of the committee of which he is a member would have gone through like "greased lightning." Mr. Kirgis said that the conference cannot be analogized to the Judicial Conference.

Mr. Harris thereupon made a motion which was seconded by Mr. Kintner, to the general effect that the ABA should rescind its action looking to sponsorship of legislation for establishment of conference. Mr. Rea agreed that legislation is now premature. Mr. Beelar expressed views with respect to tactics, stating that we cannot just ignore the conference and that a legislative proposal is inevitable.

On Sunday morning, Mr. Harris then offered a redraft of his resolution, looking to rescission of prior action by the House of Delegates, as a substitute for his previous motion. This revised motion was seconded by Mr. Keatinge. Mr. Baskette thereupon made a substitute motion which was seconded by Mr. Nelson. Mr. Gage spoke in support of the Harris motion. Mr. Keatinge urged that the Council should now take a stand and then let the Section vote on the matter at the annual meeting. Mr. Beelar expressed agreement with Mr. Keatinge. Mr. Keatinge thereupon offered a substitute motion for all pending motions. This motion was seconded by Mrs. Litvin. Messrs. Nelson and Rea spoke in opposition to the Keatinge motion. Mr. Gallagher expressed the view that the creation of a permanent conference would be the creation of a frankenstein. The Keatinge motion was then put to a vote and adopted, with Messrs. Nelson, Rea and Baskette voting against it. The motion adopted reads as follows:

> "*Resolved,* That the Council of the Section of Administrative Law hereby goes on record as opposed to the principle of a permanent administrative conference, whether by legislation, or otherwise; and
>
> "*Be it further resolved,* That the foregoing resolution be submitted to the 1962 Annual Meeting of the Section of Administrative Law; and
>
> "*Be it further resolved,* That the Board of Governors, the House of Delegates and the Special Committee on Legal Services and Procedure of the American Bar Association be advised of the foregoing action of the Council."

After some further discussion, Mr. Harris moved the adoption of the resolution hereinafter set forth. Such motion was duly seconded and adopted. The motion reads as follows:

> "*Resolved,* That the Council of the Section of Administrative Law instructs its delegate to make the following report to the House of Delegates after consultation with the Special Committee on Legal Services and Procedure:
>
> 'The House of Delegates at the 1957 Annual Meeting at Miami Beach, Florida, instructed the Administrative Law Section and the Special Committee on Legal Services and Procedure to prepare

> legislation for the House of Delegates looking to the establishment of a permanent conference on administrative procedure.
>
> 'The Section and the Special Committee have worked diligently in the drafting of legislation for this purpose. In this process, both the Council of the Section and the Special Committee have come to the conclusion that, whatever the merits of such a conference on a temporary basis may be, it should not be established on a permanent basis.
>
> 'Accordingly, neither the Section nor the Special Committee is now prepared to propose legislation to give permanent status to the Conference; and, subject to a review of this matter by the full membership of the Section at the forthcoming Annual Meeting, both the Section and the Special Committee will report and propose to the House of Delegates at that time that the Association should go on record as not endorsing the establishment of a conference on administrative procedure on a permanent basis, whether by legislation or executive order.' "

It was the concensus that a stand-by draft of legislation is highly desirable. Mr. Beelar moved that the draft of proposed bill prepared by the committee be put on the agenda for the May meeting of the Council and several (4-5) hours allocated to a discussion of it, and it was so agreed. Mr. Kirgis suggested that each Council member study the present draft of the proposed bill and make exchange of comments among ourselves prior to the May meeting. After Mr. Nelson gave highlights of the present draft of the bill for establishment of permanent administrative conference, it was agreed that an exchange of views relative to the bill will be made among members of the Council on or before April 15, 1962.

A motion to rescind action looking to publication of draft of bill in Administrative Law Review was made, seconded and adopted. The chairman of the Section agreed to notify the editor of the Review of this rescission action.

XIV. Committee on Judicial Review

The attention of the Council was called to Memorandum Report from John F. Donelan, chairman of the Committee on Judicial Review, relating to certain provisions of S. 1235, 87th Congress, first session, which deals with the organization of the U.S. Court of Claims. After some discussion, Mr. Kintner moved that the chairman of the Section discuss the subject matter with the chairman of the Section of Judicial Review and take such action as he may deem necessary after such discussion. The motion was seconded by Mr. Gallagher, and adopted.

XV. CONFLICT OF INTEREST

The various pending bills dealing with this subject matter were discussed. Mr. Beelar pointed out that legislation such as proposed Administrative Procedure Act and action as to standards of conduct spell out the ABA position. It was informally agreed that the chairman of the Section of Administrative Law would consult with the chairmen of other sections. Mr. Gallagher spoke of the broader aspects of the subject, particularly with regard to employment of retired military personnel by companies with defense contracts, and expressed the view that if the Section has jurisdiction, we could render a real service in aiding in the clarification of the matter.

XVI. JUNIOR BAR CONFERENCE

There was extended discussion relative to the importance of putting members of junior bar to work in our Section and it was agreed that Mr. Kintner, as chairman of the Membership Committee, and Mr. Berger will work out modus operandi for getting junior bar members to work on committees of the Section.

XVII. APPEARANCE BEFORE COMMITTEES ON PENDING LEGISLATION

After discussion of pending hearings on certain bills in the Congress, Mr. Gage moved the adoption of the following motion, which was duly seconded and adopted:

> "*Be It Resolved,* That the Council authorize the Chairman of the Section to express the views of this Section and the ABA as to the revisions of S. 1734 set out in S. 1937 in respect to departures from the proposals for the improvement of federal administrative procedure heretofore endorsed by the ABA and this Section and, particularly, in respect to those provisions of S. 1937 which would limit or weaken the provisions of the Administrative Procedure Act designed to control and provide for fair hearings and appropriate procedure in federal administrative proceedings and determinations."

The meeting was thereupon adjourned at 12:40 p.m., December 17, 1961.

ELIZABETH C. SMITH, *Secretary*

Members of the Nominating Committee for 1962, as appointed by Section Chairman Raoul Berger:

Mr. John W. Cragun, Chairman, 1616 H Street, N.W., Washington 6, D.C.
Mr. Frank C. Newman, School of Law, Univ. of California, Berkeley 4, California
Mr. Ashley Sellers, 1625 K Street, N.W., Washington 6, D.C.

CHAIRMAN'S PAGE

One of the most important matters scheduled for Section consideration in San Francisco is whether the Section should disengage itself from sponsorship of legislation creating a permanent Administrative Conference. At its mid-December, 1961, meeting in Washington, the Council, three members dissenting, voted to recommend to the Section a Resolution that the American Bar Association should withdraw from sponsorship of legislation creating a permanent Administrative Conference.

President-elect Sylvester Smith, in an address to the Administrative Conference on April 3, 1962, candidly stated that

> "there is a widespread feeling that the inside agency representatives so predominate in the Conference, that real objectivity though clearly promised may be lacking when the report is made. We trust that such fears are unfounded."

It was contemplated from the outset, so I was told by an important Conference personage, that the Conference would be an "agency" conference. The right of the agencies to have an Administrative Conference for the interchange of experience and ideas is indisputable. But the intermixture of outside practitioners and professors lends a facade of impartiality which does not accord with the facts. Numerically, agency representation on the Conference is about 60%, but that does not tell the whole story: With few exceptions, the outside practitioners and academicians who have been appointed to the Conference or its Council have either been critical of, or have not enlisted in, the ABA fight to revise the Administrative Procedure Act or to create a Trade Court. Not one former chairman of the Section was placed on the Council. Opposition or indifference to the ABA program is a touchstone: why should the Association seek legislation which will create a formidable, permanent instrument of opposition to its reform policies. For this we have some history.

The agencies notoriously have been resistant to reform of their procedures, *e.g.* they bitterly fought enactment of the Administrative Procedure Act; they gave half-hearted effect and then only to some recommendations of the 1953 Administrative Conference; they continue to ignore Judge Irving Kaufman's call to bring agency discovery procedures in line with those of the courts. And when Senator Carroll recently invited them to comment on the proposed ABA Code of Administrative Procedure, the agencies were almost unanimously opposed to virtually every aspect of the Code. That is their privilege.

But why should the Association press for legislation which will consolidate and strengthen such opposition. Already bills have been referred to the Conference for its views. Already there are those who urge us to put our legislative program on ice, pending study by the Administrative Conference. What reason have we to believe that an agency-dominated Conference will approve what the agencies have already categorically rejected? We expose our program for reform to needless hazards when it becomes subject to the veto of a permanent, agency-controlled Conference.

A permanent Conference would threaten creation of an Independent Office of Administrative Procedure. This Office has been envisaged as a roving Inspector General which would conduct independent studies of agency practices and make recommendations for improvement or reform to the agencies, and, if need be, to the President and the Congress, much as the Comptroller-General now independently reviews agency financial practices. In the recent words of Professor Gellhorn, such an Office would make "objective evaluations of administrative methods." 48 A.B.A. Jour. 243, 246. The key to its usefulness is freedom from all pressure by the agencies which it must criticize. The permanent Secretariat of an agency-dominated Conference cannot conceivably be free of such pressures. And the creation and consequent entrenchment of such a permanent Secretariat, empowered to conduct studies and make recommendations, inevitably must make an independent Office of Administrative Procedure seem like an unnecessary duplication.

The course of the Section and of the Association seems to me clear. Let the agencies have their own Conference; let the Association withdraw from advocacy of legislation for a permanent Administrative Conference and press vigorously for its proposed Office of Administrative Procedure.

RAOUL BERGER, *Chairman*

THE FUTURE OF THE ADMINISTRATIVE CONFERENCE

The Section at its annual meeting in San Francisco will be asked to approve a resolution adopted by the Council last December "opposing the principle of a permanent administrative conference, whether by legislation, or otherwise." So that the issues involved may be brought to the attention of Section members before the annual meeting, statements supporting and opposing the resolution are being published in this issue of the Review. The statement favoring the resolution is on the Chairman's Page. The following is submitted by Roger Nelson as one of the minority of the Council who voted against the resolution.

BACKGROUND

Since 1953 the Association and this Section have consistently supported the administrative conference concept. Consequently, a heavy burden of persuasion is assumed by those who would have the Association turn its back on the movement for a permanent administrative conference established by legislation.

Before the first President's Conference on Administrative Procedure met in 1953-4, the House of Delegates adopted a resolution stating that holding such a conference would be desirable and that the Association should take part in it, and authorized the Section of Administrative Law to further the calling of the conference and to participate on behalf of the Association (53 ABA Rep. 359). Members of the Association took a prominent part in the work of that conference. One of its major recommendations was that a similar conference be established on a permanent basis.

In 1959, after the Judicial Conference of the District of Columbia Circuit had adopted a resolution recommending to the Judicial Conference of the United States that a permanent conference on administrative procedure be established, the House of Delegates adopted a resolution sponsored by this Section endorsing the organization of a conference by interim action of the President and "by appropriate legislation providing for the permanency of such a conference and a membership of government officials and members of the bar." The Secretary of the Association was directed to transmit the resolution to the Chief Justice of the United States for consideration by the Judicial Conference

(U.S.), and the Section and the Special Committee on Legal Services and Procedure were authorized jointly to represent the Association in working with government agencies in organizing an interim conference and to recommend to the House of Delegates legislation "believed appropriate for the permanent organization and operation" of a conference (59 ABA Rep. 184).

Thereafter a bill to establish a permanent conference was prepared by the Special Committee and included in a resolution placed on the agenda of the 1961 midyear meeting of the House of Delegates. At the request of the Council of this Section, the Special Committee asked the House of Delegates to defer action on such resolution to enable the Section to develop its views on appropriate legislation. The Council authorized the Chairman of the Section to appoint a committee to develop such legislation in consultation with the Special Committee.

Meanwhile, in September 1960, Judge Prettyman, at the request of President Eisenhower had agreed to lead the initial organizing activity for another conference on administrative procedure. The movement received the support of the new administration. By executive order of April 13, 1961 President Kennedy established the Administrative Conference of the United States, which is to submit a final report by December 31, 1962. At the same time, in a special message to Congress on the regulatory agencies, the President emphasized the value of such a conference and stated that one of the matters to be considered by its Council should be "the desirability of making the Conference, if it proves itself, a continuing body for the resolution of these varied and changing procedural problems."

The committee of this Section appointed to draft legislation for a permanent conference was directed, in proceeding with its work, to observe the organization and operations of the President's Conference. The work of the committee is described in its annual reports for 1961 (13 Ad. Law Rev. 218) and 1962 and such description need not be repeated here. Suffice it to say that the views of committee members and members of the Council on all phases of the legislation have been carefully considered, the workings of the President's Conference have been closely followed, and the resulting bill has been refined and improved through several drafts. Differences of view remain on several important points, including the basic question of the relative participation to be accorded agency and nonagency representatives. However, these matters can be resolved by the Section and the House of Delegates in acting on the proposed bill. The important point for consideration now is whether there is justification for abandoning the entire concept of a permanent administrative conference legislatively based.

Reasons for a Permanent Conference

The benefits of the conference approach to administrative procedure problems were well stated by President Kennedy in his April 13, 1961 special message to Congress on regulatory agencies:

> The results of such an Administrative Conference will not be immediate but properly pursued they can be enduring. As the Judicial Conference did for the courts, it can bring a sense of unity to our administrative agencies and a desirable degree of uniformity in their procedures. The interchange of ideas and techniques that can ensue from working together on problems that upon analysis may prove to be common ones, the exchanges of experience, and the recognition of advances achieved as well as solutions found impractical, can give new life and new efficiency to the work of our administrative agencies.

Again, as Judge Prettyman said in his address on the Conference, reported in *Public Utilities Fortnightly,* September 14, 1961:

> It affords a machinery by which and a forum in which all the government agencies having functions of regulation, rule making, and adjudication can jointly and co-operatively, and with the aid of the bar practicing before them, attack their many mutual problems. It affords an opportunity for massive attack upon the problems of delay, expenses, and inefficiency in the administrative process. As President Kennedy emphasized in his message to the Congress, it affords an opportunity for the systemization of the many, sprawling, diverse, now isolated, parts of government engaged in a common undertaking. It will afford the same sort of opportunities which trade associations, scientific academies, medical societies, bankers' associations, and such afford their constituent members.

The observations of the President and Judge Prettyman, although directed to the current conference, apply with even more force to a continuing conference established by legislation.

1. There is need for a permanent conference as a continuing forum where the agencies can make a concerted and sustained attack on problems of procedure common to many or all of them. Together, agency representatives, practitioners and scholars can

concentrate on basic procedural problems that transcend the particular statutory responsibilities of any agency and must be solved for the fair and effective dispatch of the public's business. Such a body can do much to overcome parochial tendencies that inevitably develop in various agencies and, by bringing to bear the best thought and experience from the many sources represented, can in time greatly improve and strengthen procedures throughout the government.

2. A permanent, legislatively-based conference will provide the essential element of continuity which has been lacking in the conference effort to date. A conference of limited duration is restricted in the number and scope of problems with which it can deal. Further, the conference performs its vital role not simply by a passing recognition of serious procedural problems, but by instituting effective and enduring action to cope with them. This requires careful research, fact finding, and comparative analysis by committees of the conference and their expert assistants, weighing of findings and conclusions, and formulation of meaningful recommendations. Further deliberation and discussion by the conference is essential for arriving at well-balanced proposals for implementation by the agencies. While deadlines and time schedules are necessary for progress in such activity, they should not be dictated by the imminent expiration of the conference itself. In other words, the time required to do the job at hand should be available. Perhaps the most serious disability of the temporary conference is that it is all too easy for its recommendations to be filed away and forgotten. A continuing body can serve the vital role—by discussion, publicity and further reporting—of calling public and official attention to the extent to which recommended reforms have or have not been adopted. It can become a powerful force to bring about adoption of the improvements it has recommended.

3. A continuing conference will inevitably be dealing with problems which also engage the attention of this Section and many of its committees. It is noteworthy that the reports submitted this year by at least five Section committees have referred to matters under study both by the committee and a committee of the President's conference. In at least one instance, the chairman of a conference committee requested the views of members of a Section committee on a pending study. This suggests that a permanent conference can provide a responsible body in the government to which comments and suggestions of the Section can be directed

for consideration and action, and that there will be many opportunities for a combined attack by the Section and the conference to obtain needed reforms.

4. Once the desirability of a permanent conference is acknowledged, the need for legislation becomes readily apparent. Establishment by law will lend stature and prestige to the conference. An Act of Congress, better than an executive order, can reflect the general public concern with improvement in administrative procedures and provide for participation not only by the agency representatives but by other branches of the government and by practitioners and other representatives of the general public. By law appropriate provision can be made for overcoming troublesome problems of conflict-of-interest that have hampered participation by private citizens in conferences established by executive order. Legislation can also establish standards to insure that the choice of members of the council or other governing body of the conference is not dictated by political considerations, can provide for an adequate permanent staff, and can authorize the appropriations needed to enable the conference to discharge its responsibilities.

Objections

The arguments thus far made for reversal of the Association's position are not convincing. One contention is that the agencies favor the status quo and are not interested in procedural reform, so that an organization in which they have a major voice will not generate significant recommendations for improvements. It is submitted that agency representatives are intelligent enough to realize that the agencies have a vital stake in the prompt and effective discharge of their statutory duties consistent with essential fairness. The significant progress toward expediting procedures which has recently been achieved in such agencies as the Interstate Commerce Commission and Federal Trade Commission evidences an intelligent awareness of the need and concern for improving methods of handling public business. Again, it is not apparent that agency participants in the current President's conference are lagging behind other members in diligent, good faith consideration of suggestions for procedural improvements.

Another argument reflects dislike for adding one more to the long list of government agencies and the belief that the permanent conference will soon lose its sense of mission and become a mere debating society. It should be apparent, however, that the conference will differ significantly from other government agencies. It will have no regulatory authority; it should have representation from all branches of the government as well as from the bar and others knowledgeable in the field of administrative procedure; its effectiveness will depend in large measure on the quality of its membership and the support it receives from Congress and the executive branch in the effectuation of its recommendations. So long as challenging problems in the field of administrative organization and procedure remain, there is no reason for the conference to become a meaningless exercise. The significant contributions to improvements in the law which continue to be made by the American Law Institute, for example, strongly suggest that long-term existence need not lead to ineffectiveness.

Some fear that establishment of a permanent conference will detract from the Association-sponsored bills providing for a code of administrative procedure (S. 1887) and an office of federal administrative practice (S. 2189). However, there is obviously no conflict between the Association program for a code and the establishment of a permanent conference. Adoption of the code would still leave need for machinery to develop and recommend improvements in agency procedures. Each proposal should stand on its own merits, and the Association cannot in good grace insist on enactment of the code proposal as the price for continuing to endorse the conference concept. Establishment of a conference may call for modification of certain provisions of the bill for an office of federal administrative procedure. Presumably some of the study functions of the proposed director of federal administrative practice could be reduced or eliminated and the conference might make unnecessary an advisory committee to the director. But other provisions of the bill—especially those which would charge the director with receiving and investigating complaints regarding matters of practice and procedure, and place hearing examiners under his direction and control—could remain and would be entirely consistent with the conference bill.

* * *

To conclude, a continuing conference will provide a much needed mechanism for sustained attack on the many procedural problems common to the federal agencies. The movement for such a conference is entirely consistent with the policies and objectives of the Association and deserves its vigorous support.

C. Roger Nelson

REPORT OF THE COMMITTEE ON ADMINISTRATIVE CONFERENCE

The Committee on the Administrative Conference was established pursuant to a resolution adopted by the council of the section at the February 1961 midyear meeting in Chicago. The activities of the committee prior to the 1961 annual meeting in St. Louis are described in the report of the committee appearing in the Spring-Summer 1961 issue of the Administrative Law Review (Vol. 13, pp. 218-223).

At the 1961 annual meeting, the council directed the committee to continue its work and submit a draft bill to establish a permanent administrative conference for consideration by the council at its proposed December 1961 meeting and to coordinate its activities with the Special Committee on Legal Services and Procedure. On August 16, 1961, a questionnaire was sent to members of the committee and to the council soliciting comments on the provisions of the initial draft bill which had been sent to committee members under date of July 12, 1961. Based on the responses received and further study of the problems involved, a revised draft of the bill was prepared. The revised draft bill, together with explanatory comments and a summary of the responses, was submitted to the council for consideration at its December 16-17, 1961 meeting.

At such meeting, the council discussed at length the question whether the House of Delegates should be asked to reconsider its stand in favor of legislation for a permanent administrative conference. The council, with three members dissenting, adopted the following resolution:

> "*Resolved,* That the Council of the Section of Administrative Law hereby goes on record as opposed to the principle of a permanent administrative conference, whether by legislation, or otherwise; and
>
> "*Be it further resolved,* That the foregoing resolution be submitted to the 1962 Annual Meeting of the Section of Administrative Law; and
>
> "*Be it further resolved,* That the Board of Governors, the House of Delegates and the Special Committee on Legal Services and Procedure of the American Bar Association be advised of the foregoing action of the Council."

The 1962 midyear meeting of the House of Delegates was informed of the action taken by the council.

Notwithstanding such action, the council determined at the December meeting that work should proceed on developing a draft bill to be available on a standby basis for possible action at the 1962 annual meeting of the section. At a meeting held May 31, the council completed its revision of the bill and directed that it be published for the information of the section prior to the annual meeting. The bill, as revised by the council, follows this report.

At the May 31 meeting Mr. Earl W. Kintner moved for reconsideration of the above resolution adopted at the December 16-17 meeting. After discussion, the motion was tabled until the annual meeting of the council on August 4, 1962 in San Francisco.

C. ROGER NELSON, *Chairman*
Committee on Administrative Conference

DRAFT OF A BILL

To Establish an Administrative Conference of the United States

Be it enacted By the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established an Administrative Conference of the United States (referred to in this Act as the "conference"), composed of a general membership and council constituted in the manner hereinafter provided.

SEC. 2. *Purpose and functions of conference.* The purpose of the conference shall be to improve the administrative procedures and related operations of federal executive departments, commissions and agencies (such departments, commissions, and agencies are collectively referred to in this Act as "agencies"). To that end, the conference shall, among other functions, (a) conduct studies of the efficiency, adequacy, and fairness of the procedures by which agencies protect the public interest and determine the rights, privileges and obligations of persons; (b) collect and publish information concerning agency procedures; (c) recommend improvements in such procedures and in the statutory provisions relating thereto, including measures to prevent undue delay and expense and unduly long records and to establish insofar as practicable uniform procedures and rules of practice, and (d) foster cooperative efforts among the agencies and their respective bars to bring about such improvements.

SEC. 3. *The council.* The council of the conference shall consist of 11 members appointed by the President of the United States, one of whom he shall designate chairman of the council and of the conference. The council shall include not more than five persons from among the agencies and shall include at least five persons who are members of the bar in private practice. The membership of the council shall reflect diversity of experience in the field of federal administrative procedure. Not more than six members of the council shall be members of the same political party. The members of the council shall be appointed for terms of two calendar years except that the terms of six of the members first appointed shall end December 31, 196 and the terms of the remaining members first appointed shall end December 31, 196 , the term of each member to be designated by the President. Each of their successors shall be appointed for a term of two years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. Each member of the council shall serve until his successor is appointed and qualified. Members of the council may be reappointed. Any vacancy on the council shall be filled by the President by appointment from among persons eligible for original appointment to the vacant position. The conference shall elect a member of the council vice chairman of the council and of the conference. In the event the chairmanship becomes vacant, the vice chairman shall serve as chairman unless and until the President shall designate as chairman a new appointee or a current member of the council.

SEC. 4. *Membership of conference.* (a) The general membership of the conference shall consist of persons from the agencies and members of the practicing bar, scholars in the field of administrative law and government, and others specially informed by knowledge and experience with respect to federal administrative practice and procedures. The size and composition of the general membership shall be determined from time to time by the council: *Provided,* that not more than fifty percent of the general membership shall be persons from the agencies nor shall more than fifty percent of the general membership be attorneys at law in active practice. The council shall designate the agencies to be represented and the number of representatives from each, having due regard to appropriate representation among the agencies and the extent of the adjudicatory and rule-making functions of the respective agencies. The heads of the agencies shall name the representatives of the agencies so designated. Other general members (except as provided in Section 5) shall be named by the council. Members of the conference shall be appointed for terms of two calendar years, without restriction as to reappointment, except that the terms of initial members of the conference shall end December 31, 196 .

(b) A member designated from an agency shall become ineligible to continue as a member of the conference under that designation if he leaves the service of such agency. A nonagency member shall become ineligible to continue as a member of the conference in that capacity if he enters the regular service of the federal government. If a member resigns, becomes ineligible, or is otherwise unable to continue as a member of the conference, the council or the agency head, as the case may be, shall designate a successor for the remainder of his term.

SEC. 5. *Congressional and judicial participation.* There shall be appointed from each Congress as members of the conference (a) by the President of the Senate, three members of the Senate and as alternates three members of the staffs of committees of the Senate, and (b) by the Speaker of the House of Representatives, three members of the House of Representatives and as alternates three members of the staffs of committees of the House of Representatives. The Chief Justice of the United States shall appoint from the Judicial Conference of the United States three members of the conference and three alternate members.

SEC. 6. *Executive secretary and office.* (a) The conference shall maintain a permanent office at the seat of government. The chairman, with the approval of a majority of the council, shall appoint an executive secretary of the conference, who shall be subject to removal by a majority of the council. The executive secretary shall be in charge of the office of the conference and shall perform such ministerial duties as may be assigned to him by the council. During the absence or incapacity of the executive secretary, or during a vacancy in the office of executive secretary, the council shall designate an acting executive secretary. The executive secretary or acting executive secretary shall receive a salary at the rate of $20,000 a year.

(b) The chairman, with the approval of a majority of the council and subject to the civil service laws, shall appoint such employees in addition to the executive secretary as are necessary for the performance of the duties and functions of the office of the conference and shall fix the compensation of such employees according to the Classification Act of 1949, as amended.

SEC. 7. *Functions of council.* The functions of the council, in addition to those authorized in Sections 4, 6, 8, and 10 of this Act, shall be to: (i) determine the time and agenda of sessions of the conference; (ii) propose bylaws and rules of procedure, including committee organization, for approval by the conference; (iii) appoint members of committees from the general membership of the conference; (iv) propose to the conference matters concerning which the conference and its committees shall conduct investigations and studies; (v) receive and consider reports and recommendations of committees of the conference and transmit them to the conference with the views and recommendations, if any, of the council; (vi) transmit to the President, Congress, and agencies concerned reports and recommendations adopted by the conference; and (vii) exercise general supervision over the executive secretary and the affairs of the conference. The council shall not entertain requests from committees of Congress to study particular bills, but this shall not be deemed to limit the subject matter of any study or report of the conference.

SEC. 8. *Meetings and reports of conference.* (a) The members of the conference shall meet in plenary session at the seat of government at least once each year and at such other times as may be determined by the council. At meetings of the conference, the chairman of the conference shall preside and members of the council shall have the privilege of the floor but shall not vote.

(b) The conference shall submit annually a report to the President and the Congress covering the work of the conference for the preceding year and containing such information and recommendations, including recommendations for legislation, as it may deem advisable. Special reports and recommendations may also be submitted to the President and the Congress and, where deemed appropriate, to the agencies concerned.

SEC. 9. *Status of council members, general members, consultants and advisers.* Service of an individual as a member of the council, a general member of the conference, or a consultant or adviser to the conference or any committee therof, whether compensated or not, shall not be considered as service or employment bringing such individual within the provisions of Sections 216, 281, 283, 284, 434, or 1914 of Title 18 of the United States Code or section 190 of the Revised Statutes (5 U.S.C. 99).

SEC. 10. *Expenditures and appropriations.* (a) Each member of the council and each general member of the conference shall (i) receive $50 (in lieu of any other per diem or allowance for subsistence) for each day or part of a day he is in attendance at a meeting of the council or conference or of one of its committees, except that no compensation shall be paid by reason of the service of any such member who is a regular employee or official of the federal government, and (ii) be reimbursed for travel expenses incurred by him in connection with such attendance;

(b) The council may procure, without regard to the civil service laws and the classification laws, the services of consultants and advisers to the conference and its committees;

(c) The executive secretary, subject to approval of a majority of the council, may make such expenditures (including expenditures for rent and personal services, office employees, travel, law books, periodicals, books of reference, printing and binding, and studies or investigations) as may be necessary for the execution of his functions and the functions of the council and the conference, out of appropriations made from time to time by Congress. Expenditures of the executive secretary, the council, and the conference shall be allowed and paid only on presentation of itemized vouchers therefor approved by the executive secretary or such other officers as may be designated by the council for that purpose;

(d) There are hereby authorized to be appropriated such sums as may be necessary for carrying out the provisions and purposes of this Act.

PROGRESS AND PROBLEMS IN AGENCY ADJUDICATION

A resolution offered at the 1961 annual Section meeting in St. Louis prompted the Section Chairman to assign to the Committee as its primary task this year a study of the use of "employee boards" by federal administrative agencies. The resolution, which opposed the use of employee boards for adjudicatory functions, was tabled pending the report of this Committee.

The Committee selected the major regulatory agencies as a basis for the study,* and during the past year has consulted with agency members and senior staff thoroughly familiar with the problem in each of the selected agencies in an attempt to determine:

1. Whether the employee board is a useful device for reducing the volume of decisions before an administrative agency, thus allowing it to devote more time and attention to the major matters before it; and
2. Whether the use of the employee board conflicts with any of the basic principles which should govern an administrative proceeding, including the requirements of the Administrative Procedure Act.

The resolution prompting the study was offered by Donald C. Beelar, Esq. of Washington, D.C. Mr. Beelar noted that, while employee boards had been used by the Interstate Commerce Commission and several other agencies in the past, there was virtually no experience with the use of such boards in adjudicatory proceedings. He expressed concern over the recent adoption of reorganization plans permitting several administrative agencies to delegate adjudicatory functions to employee boards. He pointed out that the use of employee boards for performance of adjudicatory functions would be unsound in that they would constitute a third step in agency decisional process, they would impair the independence and status of hearing examiners, and they would expose the decision-making process to outside influence. He concluded that whatever purposes might be accomplished by employee boards, they have a "potential for worsening, rather than improving agency process."

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* Several Executive Departments have used employee boards or single employees to decide cases in the past, *e.g.*, the "judicial officer" in the Post Office Department to review a hearing examiner's decision in a fraud case. See U.S. Health Club v. Major, 292 F 2d. 665, 666-7 (3rd Cir. 1961), holding that the Postmaster General's aforesaid delegation pursuant to a reorganization plan is not inconsistent with the APA. Two other examples are the "special inquiry officer" in the Justice Department who is authorized by the 1952 Immigration & Naturalization Act to conduct inquiries regarding the exclusion and deportation of certain arriving aliens, 8 U.S.C. §§ 1225, 1226, and the "judicial officer" in the Department of Agriculture who acts as the final deciding officer in lieu of the Secretary in departmental administrative proceedings involving rate making, reparations, and disciplinary action. See *Flavin, The Function of the Judicial Officer, U.S. Department of Agriculture, XXVI* G. W. Law Rev. 277 (1958).

What is an Employee Board?

While the concept of the employee board is capable of varying definition, we have limited our inquiry to boards composed of agency employees who (1) handle routine administrative matters not involving a hearing, (2) take evidence in lieu of a hearing examiner, or (3) function as an appellate body reviewing the decisions of hearing examiners, subject in turn to some form of review by the agency itself. Our study has uncovered no opposition to the first nonadjudicatory use of employee boards. As to the second, the use of employee boards in lieu of hearing examiners appears to be prohibited by Section 7(a) of the Administrative Procedure Act (APA) except for specified classes of proceedings authorized by statute, and the reorganization plans in question have expressly preserved the prohibition of Section 7(a).* It is the third concept of employee boards as intermediate appellate bodies which prompted this study and on which the Committee has focussed which has occupied most of the major attention.

The Report on Regulatory Agencies to the President-Elect, prepared by Dean Landis of the Senate Committee on the Judiciary (December, 1960, 86th Cong. 2d. Sess.), proposed *inter alia* reorganization plans for a number of the major regulatory agencies providing for the delegation of decision-making powers to "panels of agency members, single agency members, hearing examiners or boards of employees for final determination of all adjudicatory matters, subject only to discretionary review by the agency *en banc* on petition by a party in interest." (p. 85)

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* APA Section 7(a) reads in part:

> "a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." (emphasis added)

The Senate Report on the APA noted that the underscored proviso might prove to be a loophole for avoidance of the trial examiner system and added the precautionary note that the proviso is intended "only to preserve special statutory types of hearing officers who contribute something more than examiners could contribute, and at the same time to assure the parties fair and impartial procedure." Sen. Doc. No. 248, 79th Cong. 2d. Sess., at p. 325.

Subsequently, the President proposed reorganization plans covering seven major regulatory agencies: The Federal Trade Commission (FTC), The Civil Aeronautics Board (CAB), The Federal Communications Commission (FCC), The National Labor Relations Board (NLRB), The Securities & Exchange Commission (SEC), The Federal Maritime Board (FMB) and the Federal Home Loan Bank Board (FHLBB). No reorganization plans were proposed for the Federal Power Commission (FPC) or the Interstate Commerce Commission (ICC). Only four of the seven plans were approved by Congress, namely, identical plans numbered 3 and 4 authorizing the CAB and FTC, respectively, to delegate functions, Plan No. 7, splitting the functions of the former Federal Maritime Board, and Plan No. 6, dealing with procedural changes for the Federal Home Loan Bank Board not relevant to this inquiry. After Congress disapproved the reorganization plan for the FCC, special legislation was enacted. As of this writing no new legislative authority has been granted the SEC or the NLRB, whose plans were also defeated in Congress.

The procedural changes which have been made by the major regulatory agencies studied are discussed in detail below. Our inquiry did not extend to the FPC.

1. *The Federal Trade Commission*

Historically, the Federal Trade Commission has had no experience in delegating adjudicative functions to employees or employee boards other than the usual and routine functioning of hearing examiners in hearing evidence and rendering initial decisions pursuant to the Commission's Rules of Practice.

Pursuant to the recommendation contained in the Landis Report, Reorganization Plan No. 4 of 1961, effective July 9, 1961 (F.R. Doc. 61-6479; filed, July 10, 1961), provided that the F.T.C. "shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business or matter . . . "

Under the authority of this reorganization plan the Commission has established new procedures for its adjudicative functions and has delegated certain administrative functions to its staff. It has not, however, delegated any adjudicative functions to employees or employee boards and there appears no present likelihood of such a delegation.

At the time Reorganization Plan No. 4 was adopted, the need for new procedures to clear the FTC's formidable backlog of decisional matters was apparent. As a first step, new Consent Order Procedures and Rules of Practice for Adjudicative Proceedings were promulgated on June 29, 1961. Because of substantial procedural changes incorporated in the new rules, which, in effect, require that all investigation be completed prior to issuance of the Commission's complaint, relatively few complaints were issued for the remainder of the year. As a result, the preexisting accumulation of cases has been greatly diminished by the continuing process of Commission decision. Since the new consent and adjudicative rules are still largely untested, it is too early to state whether adjudicative delegation may be considered desirable at some later date.

Under authority of Reorganization Plan No. 4, the F.T.C. has, to date, delegated to the staff a variety of nonadjudicative functions dealing with matters formerly administered by the Commission. They include: a delegation to the directors and assistant directors of the Bureaus of Restraint of Trade, Deceptive Practices, and Textiles and Furs to (1) initiate investigations of law violations, (2) close some docketed investigational files, (3) extend the time for compliance with demands for access to records, subpoenas, or orders issued during an investigation, and (4) extend the time within which reports of compliance with cease and desist orders may be filed. The Director and Assistant Director of the Bureau of Economics also were given the authority in (3) above. In addition, all motions, requests, and interlocutory appeals, other than those concerning the merits of a proceeding, can now be disposed of by an individual commissioner.

The Commission's new Rules of Practice for Adjudicative Proceedings have adopted two devices intended to reduce the Commission's workload:

(1) Interlocutory appeals, with certain exceptions, may be filed only upon a showing of good cause appropriately acted upon by the Commission.

(2) Review as of right from the initial decision of a hearing examiner has been abolished and a certiorari-type procedure in-

stituted. A hearing examiner's initial decision will be reviewed by the Commission only when two or more members of the Commission vote to grant a party's petition for review. As in the past, absent a review petition, the Commission may *sua sponte* place a decision on its docket for review.

The Commission at this time appears to have delegated to its staff all functions it intends to delegate, at least until experience under its new rules proves the present delegation insufficient. In September 1961, in a speech before the Federal Bar Association, Commissioner Elman stated:

> "The Commission is now considering how best to exercise the authority granted by Reorganization Plan 4 of 1961, so as to strike a sound balance between delegation of minor, routine administrative matters and retention of basic policy formulation, for which it must always bear collegial responsibility."

It must be assumed that the idea of delegating adjudicative functions to employee boards has now been considered and shelved.

Because the Commission is, perhaps more strictly than most, a quasi-judicial body, delegation of adjudicative functions to other than APA examiners might raise serious due process questions. The Commission appears to have concluded that much-needed easing of its decisional load can better be achieved by more careful screening of complaints, expedited hearings and limited review of initial decisions. Such measures may also be more desirable than adjudicative delegation to employee boards in terms of enhancing the status of hearing examiners.

2. *The Civil Aeronautics Board*

In October 1960, a management consultant firm prepared a report entitled "Increasing the Effectiveness of the Civil Aeronautics Board" for the Bureau of the Budget. This report focused upon one of the most serious problems facing the Board, *viz.*, the undue concentration of Board time on adjudicatory matters. It was found that fully sixty-five percent of the Board's time was being spent on adjudication, leaving but little time for such important activities as formulating substantive plans and policies.

The theme of this report was continued in the Landis report. Dean Landis noted that the lack of planning on the part of the Board stemmed from the burden of its adjudicatory work and suggested that greater authority to delegate adjudicatory and non-adjudicatory responsibility be given to the Board.

Against the background of the Landis and the management consultant's reports, Reorganization Plan No. 3 of 1961 became law. The primary purpose of the reorganization plan for the CAB (as well as for the other agencies) was to confer affirmatively the delegatory power upon the Board. It was provided that the Board retain a discretionary right or review somewhat akin to the Supreme Court's certiorari procedure.

The Board has moved to implement Plan No. 3. After public notice of proposed rule making and consideration of comments thereon, the Board, on January 23, 1962 adopted new rules of practice in both air safety and economic proceedings.* Essentially, the new rules delegate the Board's authority to make decisions in these two major areas to hearing examiners, with the Board retaining a discretionary right of review. (It should be noted that Board review is mandatory under the Plan No. 3 when two or more members believe such action to be appropriate.) Parties seeking review by the Board are directed to base their petitions upon the following grounds:

(a) a finding of material fact is erroneous;

(b) a necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent;

(c) a substantial and important question of law, policy or discretion is involved; or

(d) a prejudicial procedural error has occurred.

In addition to the above, the Board has undertaken to delegate a variety of non-adjudicatory matters to its staff under the authority of Plan No. 3. The new rules direct that petitions to the Board for review with respect to non-adjudicatory matters demonstrate that substantially the same four grounds set forth above exist. A fifth ground, "that the staff action is subsequently deficient on its face" is also provided.**

The Board's rules implementing Reorganization Plan No. 3 do not contemplate the establishment of employee boards and, because of the relative newness of the Board's rules, an evaluation of whether or not a contribution to the agency's processes could be made by such boards would be premature, Such an evaluation must await the results of the Board's new operating procedures.

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* See Reg. No. PR-58 (air safety); Reg. No. PR-59 (economic proceedings).

** See Reg. No. OR-1 (non-hearing matters).

3. *The Interstate Commerce Commission*

The nineteen employee boards now functioning at the ICC probably exceed in number those established by all other federal agencies combined. The work load handled by many of the individual boards exceeds that of many agencies.

Both the relevant statute and the ICC regulations distinguish between two types of boards. Essentially, the first type of board handles uncontested applications, or when it handles contested matters, deals with cases not heard orally. This class of board dates back to 1952, and its cases are referred to as "non-APA."

The second type of board, first established late in 1961, functions as an appellate body considering exceptions to examiners' reports in "APA-type" hearings.

General authority to establish employee boards appears in Section 17(2) of the Interstate Commerce Act, 49 USC Section 17(2). Similar authority has existed since 1933. No appellate boards were established under this section, and the Commission apparently believed it could not create appellate boards. At the Commission's request an amendment to Section 17(5) of the ICA, 49 USC Section 17(5), was adopted September 14, 1961 (P.L. 87-247; 75 Stat. 517):

> "When deemed by the Commission to be appropriate for the efficient and orderly conduct of its business, it may authorize duly designated employee boards to perform, under this paragraph, functions of the same character as those which may be performed thereunder by duly designated Divisions."

The Commission's statement in support of the 1961 amendment claimed that the ICC held 5,000 hearings a year, resulting in 2500 exceptions to examiners' reports and requiring the average Division of the ICC to decide some 830 appeals a year, in addition to participating in 175 decisions of the full Commission, and in addition to discharging all other duties of the Commission. (Senate Report 839, 87th Cong., 1st Sess.; 1961 Cong. & Ad. News 2687).

The sheer number of individual decisions demanded of the ICC is impressive. In 1961 11,692 applications for short notice permission were received; 64 released rate applications; 4,855 suspensions; 865 "4th Section" applications; 546 rail and 1303 motor carrier rate proceedings; 3672 motor carrier certificate applications, with 3537 hearings held; 3596 temporary authority applications: 327 motor carrier Section 5 applications; 989 transfer lease applications; and hundreds of other types of applications, protests and the like. (75th Annual Report of the ICC, 1961). More than 100 hearing examiners are employed. The need for some form of relief for the eleven Commissioners seems evident.

Prior to 1952 the Commission had established several employee boards "as aids" to the various Divisions. On December 1, 1952 a suspension board and a 4th Section board were formally established to take initial action in connection with the suspension of tariff and rate schedules and the granting of relief from Section 4 of the Act"; two special permission boards (the Temporary Authorities Board and the Transfer Board) were also established prior to 1961. None of these boards dealt with "APA type" cases; appeals were provided from the action of all boards to Divisions of the Commission. The suspension board averaged 5046 cases a year between 1957 and 1961; the 4th Section board averaged 818 cases and the special permission boards received 12,205 applications a year. (Interstate Commerce Commission Activities 1937-1962, Supplement to the 75th Annual Report, House Doc. No. 359, 87th Cong. 2d. Sess., pp. 63-67.)

In 1960, the ICC received reports from a Special Advisory Committee of Practitioners and a report from a firm of management consultants, both recommending increased use of employee boards. Between January and March, 1961 the ICC issued a series of orders establishing 12 new employee boards all dealing with uncontested "non-APA" cases. The Commission press release of March 30, 1961 claimed that the total of 16 boards would "handle more than 28,000 matters annually."

In November, 1961 the Commission established its first three appellate boards under its new statutory power: the Finance Review Board; the Operating Rights Review Board; and the Rates and Practices Review Board. The ICC Organization Minutes assign to these Boards "cases or types of cases specified from time to time" by Division Chairmen. The specifications, published as Appendices to the Organization Minutes provide that certain "determinations may be made" by each Board. The current appendices reserve certain important cases for decision by Divisions, including cases described (Operating Rights Review Board) as "those proceedings which, after due consideration, are found to involve broad questions or issues of administrative policy."

The boards function as appellate bodies, although a petition for reconsideration by a Division may be filed. Any board can certify a case to a Division directly. The ICC Budget and Fiscal

Office estimates the current work load of the boards at about 500 cases a year, subject to change as their assigned work load changes.

In addition, in 1961 all but one ICC Division began the practice of adopting examiners' reports by order, without writing a new decision—called the "Dando" (decision and order) procedure. This procedure, incidentally, was suggested by the Comptroller General as a more desirable alternate to use of appellate boards.

Neither any published report of the ICC, nor any comments received in a small random sample of ICC practitioners have objected to the use of either original or appellate employee boards. Commissioner Hutchinson told the Committee that while the use of employee appellate Boards is obviously an experiment, they deserve a trial.

To summarize the use of employee boards by the ICC:

(1) The huge case load of the ICC justifies use of employee boards to make "non-APA" decisions. Such boards have been tried for nine years, and have apparently worked without any charges that concepts of due process and fair play have been violated.

(2) The hearing examiner's status, while not improved by appellate employee boards, has been strengthened by the "Dando" procedure, which lets the examiner's decision stand as the decision of the agency.

(3) The appellate boards have existed too briefly to justify any conclusions. While the case load appears sufficient to justify use of appellate boards, the problem of creating an extra appellate step remains. In practice, however, the problem may not be too great: (a) because the boards should consider small, routine cases, where an extra petition will not involve a great burden (or where the cost of a petition may discourage its filing); and (b) because the ICC probably will not reverse the boards frequently; thus, further appeals may be discouraged.

Any judgment on the ICC's use of employee boards must recognize (1) the enormous volume of cases; (2) that few decisions involve either major policy considerations or difficult matters of law; and (3) that most ICC decisions are not similar to court decisions in their approach to the facts and their application of the law. Thus, review of an examiner's decision often amounts to a mere restatement of the record and announcement of a similar or different conclusion without significant change in the facts found or the legal principle applied. No more uniformity is lost by splitting the function of review between a Division and a board than is lost when different litigants in court obtain different juries.

The nature of ICC decisions makes it difficult to see wht devices other than the use of employee boards and the Dando procedure could cope with the flood of contested cases. Under present law and doctrine, rule-making proceedings cannot be used to dispose of large blocks of cases. The statute contemplates case-by-case application of extremely hazy statutory principles. Thus, any real diminution in the case load cannot be achieved without major statutory changes amounting either to abandonment of some fields of regulation or abandonment of the case-by-case method of decision.

4. *The Federal Communications Commission*

Prior to 1961, the Federal Communications Commission had not generally operated with the use of employee boards. Delegations from the Commission to its staff were normally delegations to the head of an operating bureau or some other individual official. In certain areas, Commission authority has been delegated to boards of Commissioners (consisting of one or more commissioners) either because of vacation problems or, as in the case of the Telegraph Committee, because of the relative triviality of the problems presented. Such delegations to boards of Commissioners, however, have not taken place in adjudicatory cases although certain procedural fuctions have been delegated to individual Commissioners serving as Motions Commissioners.

On August 31, 1961 (after legislative defeat of a Presidential reorganization plan similar to those adopted for the FTC and CAB), Public Law 87-192 was enacted. Section 2 of this Law amends Section 5(d) of the Communications Act of 1934, as amended, 47 U.S.C. 5(d), to read as follows:

> "(d)(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6), of this subsection) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in the Administrative Procedure Act), the delegation in

any such case may be made only to an employee board consisting of three or more employees referred to in paragraph (8). Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, of any hearing to which such section 7(a) applies.

"(2) As used in this subsection (d) the term 'order, decision, report, or action' does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b).

"(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

"(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1).

"(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405.

"(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1). The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

> "(8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in the Administrative Procedure Act) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification of salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In the performance of such review functions such employees shall be assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

Under the new law the previous rights to file exceptions to initial decisions of hearing examiners and to have a review as of right were continued, but the review may now be before the Employee Review Board. The previous right of oral argument on review was eliminated. In addition, the rehearing provisions of the statute were amended to permit petitions for rehearing of decisions by any "designated authority" to which authority has been delegated under Section 5(d)(1). The provisions with respect to *ex parte* presentations were amended to preclude any person who has participated in a hearing case from directly or indirectly making any additional *ex parte* presentation respecting such a case to any designated authority to whom, in such case, review functions have been delegated by the Commission under Section 5(d)(1).

The Commission has been engaged in study of the methods of implementation of the new statute for a number of months and it is understood that promulgation of rules creating and governing the conduct of an Employee Review Board is imminent.

Until the rules governing the proposed three-man Employee Review Board are adopted and the Board actually functions under the rules for a reasonable period of time, it is impossible to determine whether the Board will effectively lighten the burdens on the Commission with respect to adjudicatory cases and expedite the rendering of final decisions, as hoped by the sponsors of the legislation. It also cannot be determined in advance whether the fears of opponents of the legislation will be realized through a diminution of the role of the independent hearing examiner under the Administrative Procedure Act, as applied in Federal

Communications Commission cases, or through creation of additional delays by the interposition of an additional level of appellate agency review. Much will depend upon the following factors:

1. The scope of the delegation to the Review Board both as to volume and kinds of cases;
2. The tenure, calibre and general position of independence of the Board;
3. The kind and nature of staff assistance made available to the Review Board and the extent to which any staff personnel assisting the Review Board is permitted also to assist the Commission when it passes upon the same cases after decision by the Review Board;
4. The extent to which the Commission exercises its discretionary power to hear cases decided by the Review Roard and the weight given by the courts to decisions of the Review Board where the Commission has denied further administrative review; and
5. The extent to which decisions of the Review Board and the Commission develop a consistent pattern which would encourage the Bar to hold to a minimum the cases in which review of decisions of the Review Board by the full Commission is sought.

It is anticipated that this report will be supplemented, if this Committee continues in being, after the rules implementing the new statute in creating the Review Board are promulgated, and again at a later time after the Review Board has been in operation for six months or a year.

5. *The Federal Maritime Commission and the Maritime Administration*

The two chief Maritime regulatory statutes are the Shipping Act, 1916 (46 U.S.C. Section 801 *et seq.*) and the Merchant Marine Act, 1936 (46 U.S.C. Section 1101 *et seq.*). The Shipping Act—with its supplement, the Intercoastal Shipping Act, 1933 (46 U.S.C. Section 843)—regulates the activities of common carriers by water. The Merchant Marine Act of 1936 governs the grant of subsidy to United States flag lines. Substantially all functions under the Shipping Act involve hearings and agency decisions on a public record. In contrast, only those few sections of the Merchant Marine Act which deal with the effect of subsidy on competitors require a public hearing before agency action.

Prior to August, 1961, the former Federal Maritime Board (a three-man independent agency) administered both the Shipping Act and also those sections of the Merchant Marine Act which require public hearing. In addition, the actual grant of subsidy contracts was a function of the Board. The Maritime Administration, a theoretically separate agency, handled all other promotional functions under the Merchant Marine Act. The split in functions was not complete, for the Maritime Administrator was also the Chairman of the Federal Maritime Board.

By Reorganization Plan No. 7 of 1961 (26 F.R. 7315), effective August 11, 1961, a new five-member Federal Maritime Commission (FMC) was created as an independent agency to enforce the Shipping Act. All functions under the Merchant Marine Act passed to the Secretary of Commerce and his subordinate in the Department of Commerce, the Maritime Administrator.

The Federal Maritime Commission

Section 105 of Plan No. 7 gives the FMC the right to delegate any function to an employee board "providing, however, that nothing herein contained shall be deemed to supersede the provisions of Section 7(a) of the Administrative Procedure Act." The FMC must retain the right of discretionary review.

Using this power, the FMC has established an employee board to pass on applications to change tariffs on special permission—which do not involve hearings—and has delegated various minor powers to bureau chiefs. The special permission board has acted on 90 applications; two appeals have been taken to the FMC, and both were successful. Delegations of this sort of function to this type of board, following the ICC pattern, appear to be unexceptionable. While most other FMC decisions involve hearings of substantial length, the docket is not crowded, and there appears to be neither need nor inclination to establish any intermediate appellate employee boards.

The Maritime Subsidy Board

By Department Order 117, the Secretary of Commerce established a Maritime Subsidy Board (MSB) composed of the Maritime Administrator, the Deputy Maritime Administrator, and the Comptroller of the Maritime Administration. The MSB has both administrative powers and quasi-judicial functions. Applications requiring public hearing under the Merchant Marine Act—essentially questions of the effect of subsidy on competitors—are heard first by an MSB examiner. Cases are few, but extremely lengthy. Exceptions to the examiner's report are then disposed of by the MSB. Petitions for discretionary review by the Secretary of Commerce are permitted.

In most agencies, employee boards are subservient to, or alternates for, agency members. The MSB is perhaps unique in being an employee board which in effect functions in most instances as the agency itself.

The MSB also offers an interesting example of the merger of quasi-judicial and administrative functions. MSB decisions control the awards of tens of millions of dollars of subsidy with obviously important competitive effects, but the MSB itself consists of active administrators in daily contact with the shipping interests who appear as litigants before the MSB. It is entirely possible for an applicant to seek administrative approval for a project from subordinates of MSB members before the application comes to the MSB for decision after hearing on a public record. Such a merger of duties has existed in predecessor Maritime agencies since 1936, and has usually been justified by the promotional purposes of the Merchant Marine Act.

In recent testimony before a House Committee,* the Secretary of Commerce reported that between August 12, 1961 and March 31, 1962, the MSB took 333 "official actions" of which 196 were eligible for review by the Secretary. Six petitions for review were filed, review was granted on two, denied on four, and the Secretary reviewed two actions on his own motion. Since 1936, only 130-odd subsidy cases have been heard; therefore, the great bulk of these MSB "actions" obviously did not involve contested hearings on a public record.

While the Secretary's reviewing power may be exercised sparingly, the importance of most litigated MSB cases seems to mean that review will usually be sought by a losing party. And, since MSB members are employees of the Department of Commerce, even infrequent review—or no review at all—would permit the Secretary to control MSB policies.

6. *The National Labor Relations Board*

The NLRB presently handles several thousand appeals each year from decisions of trial examiners. Each of the five Board Members has approximately twenty legal assistants who are solely concerned with reviewing cases and preparing decisions for the responsible Board Members. The Board clearly has an excessive workload.

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* Testimony of Secretary Hodges before the Merchant Marine Subcommittee of the House Committee on Merchant Marine and Fisheries, April 11, 1962, reported in Congressional Information Bureau Bulletin, Vol. 66, Cargo, No. 89.

A Taft-Hartley Act Amendment to the Wagner Act (29 U.S.C. Section 153(b)) authorized the NLRB to delegate any of its powers to any group of three or more members. The Landrum-Griffin Act amended the Taft-Hartley Act (29 U.S.C. Section 153(b) (1961 Supp.)) to authorize the Board to delegate to its regional directors power to determine the appropriate bargaining unit, to investigate and hold hearings to determine whether a question of representation exists, and to direct an election. The Board has discretionary power to review such decisions. Reorganization Plan No. 5 (NLRB) as identical to Plan No. 3 (CAB) and Plan No. 4 (FTC) except for omission of Section 2 of the latter plan, which transferred certain powers to the Chairman with respect to the assignment of Board personnel. Plan No. 5 was defeated in Congress.

The Board has recently adopted rules (Rules and Regulations and Statements of Procedures, Amendments to Rules and Regulations, Series 8, sub-part C, Section 102.60 through Section 102.72) taking advantage of Landrum-Griffin authority to delegate initial decision-making authority to regional directors in representation cases with discretionary review power in the Board.* Since the Board has only recently published rules under this authority, there has been little experience to assess. There is no apparent reason why delegation in representation cases to regional directors should not work to alleviate some of the Board's oppressive work load. The statutory authorization was supported by both management and labor, since both suffered from chronic delays in the determination of representation cases.

Pressure of work load in unfair practice cases also probably requires some change in existing practice. The solution would not seem to be insertion of employee boards as an intermediate appellate step, with discretionary review by the Board, but rather adoption by the Board of a practice of affirming trial examiners' decisions under summary procedure, unless exceptions are filed which fairly call for full agency review under standards conforming generally to those set forth in the Board's rules governing its review of regional directors' decisions in representation cases. We understand that it is the Board's present position that such an innovation should be based upon unequivocal statutory authority.

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* Section 102.67 reads in part:

> . . . .
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> (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

7. *Securities & Exchange Commission*

As noted above, Reorganization Plan No. 1 for the SEC was not approved by Congress. S. 2315, a bill designed to accomplish the basic objectives of Plan No. 1, was passed by the Senate on September 1, 1961, and referred to the House Committee on Interstate and Foreign Commerce where it is still pending; no hearings have been scheduled to date.

We understand that the SEC has not pressed strongly for this legislation because it does not feel the same need to delegate decision-making as do some of the other regulatory agencies. In the first place, to date the Commission has not had a large volume of adjudications; it currently publishes only about fifty full-dress opinions each year.* Secondly, the Commission has largely avoided controversies as to how particular procedures should be labeled by focusing attention initially on what procedural steps the parties consider appropriate. This approach is thought to be necessary because the Commission's statutory procedures are so numerous, varied and complicated that classification might encourage prolonged litigation. This approach was achieved by the adoption in large part shortly after the enactment of the APA of present Rule 8(b) of the Commission's Rules of Practice, Title 17 C.F.R. Section 201 *et seq.* (1960), which requires the moving party in "any proceeding," to specify "the procedures considered necessary or appropriate in the proceeding, with particular reference to (1) whether there should be a recommended decision by a hearing officer, (2) whether there should be a recommended decision by any other responsible officer of the Commission, (3) whether the interested division of the Commission may assist in the preparation of the Commission's decision, and (4) whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective." Other parties may object to these procedures or specify additional procedures considered necessary or appropriate, and the failure to object or specify additional procedures may be deemed a waiver. Normally, agreement is obtained and the Commission is called upon comparatively rarely to determine disputes as to the procedures to be followed in a proceeding.

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* There is some question whether this condition will continue in view of the Commission's stepped-up enforcement activities and resulting proceedings for broker-dealer revocations, stop-orders, and suspensions of Regulation A exemptions.

Much of the work of the Commission relates to registration of new securities. Here the Commission has delegated to its staff review and comment on proposed registration statements, leaving to itself the authority to make the registration statement effective upon recommendation of the staff.* Of course, where the staff recommends institution of stop-order proceedings, more formal administrative procedures come into operation. But even here, as noted above, the hearing officer's action is in the form of a recommended decision, not in initial decision.

The SEC is one agency where there would seem to be little call for employee boards to handle adjudication. In fact, it appears that over the years the Commission has accomplished the same purpose by delegating considerable authority to its staff to advise and consult with registrants and others having business with the Commission.

CONCLUSIONS

Within the practical limits of time and experience, the Committee has investigated two regulatory agencies (F.T.C. and C.A.B.) which chose to publish rules pursuant to authority under 1961 reorganization plans establishing a certiorari-type review without the interposition of an intermediate employee board; two agencies (I.C.C. and F.C.C.) which under new statutes have established or are about to establish adjudicatory employee boards; one agency (N.L.R.B.) which has delegated initial decision-making in representation cases to an employee (the regional director) under a 1959 statute, retaining discretionary review in the Board; one agency (S.E.C.) which has made no significant delegation of decision-making, and one agency (F.M.C.), where, under delegation from the Secretary of Commerce pursuant to a reorganization plan, a hybrid employee board (M.S.B.) has been established.

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* But see Committee on Banking and Currency, Sen. Rep. No. 776, 87th Cong., 1st Sess., August 24, 1961, accompanying § 2135, indicating that the Commission desires statutory authority to delegate this function, "since this is a major workload area in which the full Commission needs to be relieved of initial responsibility" (p. 7). The Commission contemplates that under such a delegation a denial of acceleration of a registration statement or of the effectiveness of a post-effective amendment would be subject to a mandatory right of review by the full Commission.

At the outset of this project the Committee undertook to study two questions:

1. Whether the employee board is a useful device for reducing the increasing volume of decisions before administrative agencies, and
2. Whether the use of employee boards for adjudicative functions conflicts with any basic principles which should govern an administrative proceeding.

Our studies of major regulatory agencies disclosed that consideration of these questions could only produce an incomplete answer to the problem. Any tentative conclusion that an employee board has utility in easing an agency's workload must be supplemented as well by an inquiry into whether the employee board, in pragmatic terms, is the *most* useful device or whether there are alternative devices of equal or greater utility and fairness.

Our studies also graphically showed that procedural and substantive problems vary from agency to agency and that there can be no generalized solution, applicable to all agencies, to the problem of overcrowded agency dockets. Any suggestion that a single uniform solution can be reached is wholly illusory. It has also forcefully been impressed upon us that procedural devices to ease agency workloads may, at best, provide only a stop-gap or partial solution. Some agencies may find fundamental solutions to crowded dockets in disposition of major issues by rulemaking. In other agencies, the pressure of litigation may be eased by clearer enunciation of policies. In still others, the decision-making process, either by statutory design or inadvertence, has come to involve case-by-case disposition of huge numbers of minor issues on vaguely enunciated standards; the only basic solution to the problems of such agencies may lie in a complete recasting of the statute.

Our efforts, thus, have been directed toward evaluating, objectively and cautiously, within the very limited state of empirical evidence, the individual problems of each agency and the procedures being adopted for relief by those agencies. Some agencies have resorted to delegation of decision-making functions to divisions of the Agency or to individual members rather than to employee boards; others, such as the F.T.C. and the C.A.B. have now initiated certiorari-type review of hearing examiners' decisions. Of the two regulatory commissions which have initiated or are initiating the use of employee boards for adjudication, the I.C.C. apparently did so because it did not believe the certiorari-type review alone would be adequate for reducing its tremendous volume of cases, and the F.C.C. is doing so because it is precluded by its new statute from using the certiorari-type review without the interposition of an intermediate appeal as of right.

In the present limited state of our knowledge and experience with the use of employee boards for adjudicative functions, the following *tentative* conclusions are offered:

1. In decisions not subject to the requirement of an APA "on the record" hearing, i.e., where no hearing is required by statute, use of a non-adjudicative employee board appears to be unexceptionable.

2. We do not endorse the sharp criticism of adjudicative employee boards expressed at the 1961 meeting of the Administrative Law Section, which originally inspired our study. The principle of an adjudicative employee board is one which clearly may be subject to abuse but is also one which, if administered rationally and with appropriate deference to procedural safeguards, may offer substantial benefits. At the present time, we are unable to determine in which direction use of such boards by administrative agencies may tend. At the same time, we believe that no alternative to adjudicative employee boards necessarily offers a sure panacea, and the alternative most usually suggested, that of a certiorari-type review, is itself subject to abuse.

3. We deem it advisable to withhold judgment as to the utility in intermediate employee boards where informed determinations have been made by the agency itself that this procedure is preferable. In this connection, the future experience of both the I.C.C. and the F.C.C. with intermediate employee boards established under their amended statutory powers should be instructive and should offer more substantial basis for reasoned judgment.

4. The employee review boards recently established by the F.C.S. are likely to provide the most significant test of this new procedural device and may well provide a prototype for expanding the use for such procedures to other agencies. The usefulness of such employee boards and their fairness and effectiveness in terms of administrative due process may be determined by the following factors:

a. The scope of the delegation to the Review Board both as to volume and kinds of cases;

b. The tenure, calibre and general position of independence of the Board;

c. The kind and nature of staff assistance made available to the Review Board and the extent to which any staff personnel assisting the Review Board is permitted also to assist the Commission when it passes upon the same cases after decision by the Review Board;

d. The extent to which the Commission exercises its discretionary power to hear cases decided by the Review Board and the weight given by the courts to decisions of the Review Board where the Commission has denied further administrative review; and

e. The extent to which decisions of the Review Board and the Commission develop a consistent pattern which would encourage the Bar to hold to a minimum the cases in which review of decisions of the Review Board by the full Commission is sought.

5. The two agencies granted new authority to delegate adjudicative functions under reorganization plans (the C.A.B. and the F.T.C.) have declined to establish intermediate employee boards for appellate review of initial decisions and have initiated instead discretionary certiorari-type review procedures. (Somewhat analogous procedures would be established for all agencies under the Carroll Bill, S. 1734, a modified form of which was recently endorsed by the Administrative Conference). This discretionary review device, while offering obvious virtues with respect to reducing agency case loads, is itself subject to possible abuse. An agency afflicted with a large and increasing volume of cases may tend to deny review without adequate consideration of the issues presented upon petition for review. Thus, review as of right by an employee board would at least assure a consideration of the record by a tribunal other than the original trier of the facts.

6. Whatever the review device adopted to ease agency dockets, we believe it essential that litigants be assured some form of *actual* review of initial decisions. Whether such a review can be accomplished with a certiorari-type procedure, or whether some alternative procedure permitting summary affirmance with a brief statement of reasons would be more desirable, in our view, requires further exploration.

FRANKLIN M. SCHULTZ, *Chairman*
Committee on Agency Adjudication

UNIFORMITY IN RULES FOR AGENCY ADJUDICATION: A COMPARISON OF THE CAB, FTC AND FCC RULES

A rapid comparison of the Rules of Practice of the Civil Aeronautics Board and the Federal Trade Commission indicates little likelihood of any similarity in the procedures of those two agencies. The rules differ substantially, beginning with the description of the type of proceeding to which the rules of each agency are applicable. The Federal Trade Commission's rules "govern procedure in adjudicative proceedings before the Federal Trade Commission" [1] while the Civil Aeronautics Board rules govern "the conduct of all economic proceedings before the Board." [2] Indeed, it could be said that the only similarity between a CAB proceeding and an FTC proceeding arises, first, from the fact that a substantial number of the participants in each proceeding have been trained in the principles and procedures of the common law and its statutory modifications, and, second, from the fact that lawyers and non-lawyers alike tend to adopt the formalities of our legal system as the most satisfactory manner in which to determine controversies by peaceful means.

Therefore, before comparing the procedures, consideration should be given to the difference in the proceedings which are to be determined by the procedures. An economic proceeding before the Civil Aeronautics Board is a proceeding to determine whether a certificate of public convenience and necessity should be issued to permit air service to be operated between particular cities. The proceeding may be initiated by an airline desiring to furnish the service, by a city desiring service or by the Board which is charged by law with "the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the postal service, and of the national defense," and which will be an economically sound system and provide safe air transportation to the public at reasonable charges.[3] Other parties may include competing airlines and cities whose interests compete with the interests of the cities which desire service. On the other hand, the Federal Trade Commission has the responsibility of enforcing the laws within its jurisdiction by summoning before it for a hearing anyone who it has reason to believe has acted in violation of those laws, in order that it can determine whether a cease and desist order should be issued.[4]

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[1] FTC Rules of Practice, Part 4, § 4.1.

[2] CAB Rules of Practice, Part 302, § 302.1.

[3] 49 U.S. Code, § 1302.

Where the functions of agencies are as different as those of the CAB and the FTC, it might well be expected that their proceedings for the fulfillment of those functions should be equally different. However, on close examination the proceedings appear to be quite similar because they are nothing more than the means of reaching a decision in a particular matter and must have a beginning, a middle, and an end. As Senator Dirksen observed when speaking in the Senate about the elements of an administrative proceeding:

> "A claim and the relief sought must be stated. The claim must be answered to determine which points are admitted and which points are actually in dispute. There must be provisions for the other steps which can be taken in the proceeding and a time schedule for the steps. There must be provisions relating to the form of the decision and for an appeal." [5]

An examination of the FTC Rules of Practice and the CAB Rules of Practice bears out this statement. The rules of each agency require that the document initiating a proceeding shall contain a reference to the legal authority under which the proceeding is commenced, a concise statement of the facts relied upon and a statement of the result which the moving party desires.[6] In the case of the CAB this result is described as "a statement of the relief sought." In the case of the FTC the result is described as a "form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint," but this is nothing more than a statement of the result sought by the Commission as the moving party. The rules of each agency also provide for an answer to the initial complaint in enforcement proceedings[7] which must contain specific admissions or denials of each allegation and fully advise the agency as to the nature of the defense.[8] In other types of proceedings before the CAB an answer may be filed, but will not usually be required,[9] because such proceedings generally do not become adversary until interveners with conflicting or competing interests file petitions to enter the proceedings. Answers are permitted to such petitions at that time.

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[4] 15 U.S. Code, § 45(b).

[5] Congressional Record—January 19, 1960, p. 624.

[6] CAB Rules, § 302.4 (a); FTC Rules, § 4.4 (a).

[7] CAB Rules, § 302.207; FTC Rules, § 4.5.

[8] CAB Rules, § 302.207(b); FTC Rules, § 4.5(b).

A number of the rules of each agency are very similar. These include the rules pertaining to service of documents,[10] the computation of time,[11] extensions of time,[12] parties and their representatives,[13] and prohibitions against former agency personnel representing other parties in matters in which they participated while with the agency.[14] Though the language of the particular rules differs in certain respects, each agency also provides by rule that the hearing officer shall withdraw from a proceeding if he deems himself disqualified and, if he does not withdraw, a method by which a party can ask the agency to disqualify a hearing officer.[15] Each agency also sets out by rule the size of the paper which may be used in documents filed with the agency, the number of copies which must be filed, the forms of the documents[16] and a provision as to how documents shall be filed.[17] The rules of each agency also require that documents be signed by the party or its attorney and provide that such signing constitutes a certification by the person signing that the contents are true to the best of his knowledge and that the document is not interposed for the purpose of delay.[18]

The similarity between the rules of the two agencies also applies to the conduct of proceedings in the prehearing and hearing stage of a proceeding. Each agency prescribes substantially similar powers and duties for presiding officers[19] who include "Section 11" hearing examiners (Section 11, Administrative Procedure Act) and also agency members when they preside at a hearing.[20]

The procedure with respect to motions is almost identical under the rules of each agency.[21] During the time a proceeding is before an examiner any motions are to be addressed to the examiner; at other times they are to be addressed to the agency. Motions must state the relief or action sought and the grounds upon which it is sought. Opposing parties may file answers to motions within the time provided by the rules. Each agency provides that the hearing examiner shall rule upon motions addressed to him and each permits appeals from the rulings of the hearing officer to the agency under certain conditions.[22]

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[9] CAB Rules, § 302.6.

[10] CAB Rules, § 302.8; FTC Rules, § 4.26.

[11] CAB Rules, § 302.16; FTC Rules, § 4.25.

[12] CAB Rules, § 302.17; FTC Rules, § 4.25(b).

[13] CAB Rules, § 302.11(a); FTC Rules, § 4.23(a).

[14] CAB Rules, § 302.11(b); FTC Rules, § 4.23(b).

[15] CAB Rules, § 302.22(b); FTC Rules, § 4.13(f).

[16] CAB Rules, § 302.3(b), (c); FTC Rules, § 4.24(b), (c), (d).

[17] CAB Rules, § 302.3(a); FTC Rules, § 4.24(a).

[18] CAB Rules, § 302.4(b); FTC Rules, § 4.24(e).

[19] CAB Rules, § 302.22(c); FTC Rules, § 4.13(c).

[20] CAB Rules, § 302.22(a); FTC Rules, § 4.13(a).

[21] CAB Rules, § 302.18; FTC Rules, § 4.6.

Each agency has also included in its rules provisions for the taking of depositions by the parties upon good cause being shown to the agency or to the hearing officer if one is assigned to the matter.[23] Each agency has likewise made provision in its rules for the issuance of subpoenas [24] and for the payment of witness fees and mileage.[25] The conduct of prehearing conferences is among the powers granted to presiding officers [26] and each agency also has rules which are substantially similar in substance devoted to the procedures to be followed in prehearing conferences.[27]

The FTC Rules [28] specifically provide for admissions as to facts and documents but the CAB rules have no similar section except in the case of enforcement proceedings [29] although the section relating to prehearing conferences provides that during the prehearing conference "consideration will be given to: . . . (2) admissions of fact and the genuiness of documents." [30]

The actual conduct of the hearings pursuant to the procedure set out in the rules is again quite similar. In each case there is a provision that the parties be given adequate notice of the hearing; and each party also has the right to present evidence, argument, objections and exceptions.[31]

The rules with respect to evidence presented at hearings are also substantially similar.[32] Each agency requires that the evidence be relevant, material and not undully repetitious and each agency provides for objections to evidence and for offers of proof with respect to excluded evidence. The rules of both agencies provide that the hearings shall be recorded and transcribed by an official reporter of the agency under the supervision of the presiding officer;[33] that copies shall be available to the parties (the FTC also includes the public) at established rates;[34] and for corrections to the transcript.[35]

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[22] CAB Rules, § 302.18(f); FTC Rules, § 4.18.

[23] CAB Rules, § 302.20; FTC Rules, § 4.10.

[24] CAB Rules, § 302.19; FTC Rules, § 4.15.

[25] CAB Rules, § 302.21; FTC Rules, § 4.16.

[26] CAB Rules, § 302.22(c)(7); FTC Rules, § 4.13(c) (6).

[27] CAB Rules, § 302.23; FTC Rules, § 4.8.

[28] FTC Rules, § 4.11.

[29] CAB Rules, § 302.212.

[30] CAB Rules, § 302.23(a).

[31] CAB Rules, § 302.24 and 302.25; FTC Rules, § 4.14(b).

[32] CAB Rules, § 302.24; FTC Rules, § 4.12.

At the conclusion of the hearing the rules of each agency permit the parties to submit proposed findings and conclusions for consideration by the presiding officer,[36] and the FTC rules require the presiding officer to make a ruling for the record on each proposed finding and conclusion except when his order disposing of the proceeding otherwise informs the parties the action taken by him on the findings and conclusions proposed.[37] In each agency the decision of the presiding officer becomes the decision of the agency unless a proper objection is made within the prescribed time,[38] but the CAB rules permit the presiding officer, without making a decision, to certify the record to the agency for a tentative decision by the agency.[39]

Regardless of whether the decision following the hearing was made by the presiding officer or by the agency, the rules of each agency provide for a review of that decision by the agency upon the request of a party and require a party seeking review to set forth with particularity the points on which he wishes review.[40] The rules of each agency also provide that any objection not raised in a request for review shall be deemed waived.[41]

In its new rules the Federal Trade Commission has adopted an intervening step in connection with agency review of the presiding officer's decision by requiring a party seeking review to present a petition for review which states the question upon which review is sought and the reasons why review by the Commission would be in the public interest.[42] The Commission, in its rules, reserves the right to grant such a petition only if the questions presented are substantial and the Commission determines that review by it is "necessary or appropriate to insure a just and proper disposition of the proceedings." If the Commission decides to deny the petition for review the decision of the presiding officer then becomes the final decision of the agency.[43]

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[33] CAB Rules, § 302.24(k); FTC Rules, § 4.14(f).

[34] *Ibid.*

[35] CAB Rules, § 302.24(l); FTC Rules, § 4.14(g).

[36] CAB Rules, § 302.26; FTC Rules, § 4.17.

[37] FTC Rules, § 4.17.

[38] CAB Rules, § 302.28; FTC Rules, § 4.19(a).

[39] CAB Rules, § 302.29.

[40] CAB Rules, § 302.30; FTC Rules, § 4.20 (a), 4.21.

[41] CAB Rules, § 302.30; FTC Rules, § 4.21(b).

[42] FTC Rules, § 4.20(b).

Where a proceeding is before the agency for review, the rules with respect to briefs which can be filed with the agency are detailed,[44] contemplate the filing of answering or opposing briefs [45] and permit oral argument in the discretion of the agency.[46] Although they differ substantially in language, the rules of each agency provide that on review the agency will consider the record below and make its own decision without regard to the decision of the presiding officer on either findings of fact or conclusions of law.[47]

The CAB Rules expressly provide for petitions to the Board for reconsideration of the Board's decision on review.[48] There is no comparable provision in the FTC rules but such a procedure is commonplace in judicial proceedings upon which the procedures of each agency are based and equally applicable to the proceedings of that agency.

In another minor area the rules also differ because the FTC rules provide for reports of compliance,[49] and there is no similar provision in the rules of the CAB applicable to enforcement proceedings.

Each of the agencies has a provision in its rules to protect the integrity of its proceedings. In the case of the FTC it applies to ex parte communications between agency personnel engaged in investigative or prosecutive functions and parties on the one hand and agency personnel engaged in the decisional process on the other hand.[50] It requires a report of the substance and circumstances of any prohibited ex parte communication.[51] The Civil Aeronautics Board includes a comparable provision in Part 300.2 of its Principles of Practice. Neither the FTC rule nor the CAB rule provides any specific penalty for making a forbidden communication although section 300.6 of the CAB Principles of Practice provides that the agency may deny the relief requested by a party in a proceeding in which the party has violated this or other provisions of the rules.

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[43] FTC Rules, § 4.20(d).

[44] CAB Rules, § 302.31; FTC Rules, § 4.21(c), (f).

[45] CAB Rules, § 302.31(a); FTC Rules, § 4.21(d), (e).

[46] CAB Rules, § 302.32; FTC Rules, § 4.21(g).

[47] CAB Rules, § 302.36 provides:

> "Upon submittal of a case to the Board for final decision on the merits the Board will consider the whole record, including the initial recommended decision of the examiner . . . and the exceptions thereto, will resolve all questions of fact by what it deems to be the greater weight of the evidence thereon, will make its decision, stating the reasons or basis therefore, and enter an appropriate order."

FTC Rules, § 4.22 provides:

> "(a) Upon review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented; and in addition will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.
>
> "(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions and other contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action."

[48] CAB Rules, § 302.37.

[49] FTC Rules, § 4.28.

In general, it would appear from a close examination of the rules of each of these agencies that their rules are so similar either agency could without great difficulty conduct its proceedings under the rules of the other agency, should its own rules suddenly be destroyed.

The first half of this report concludes that a basic similarity exists between the Rules of Practice and Procedure adopted by the CAB and the FTC such that generally one agency could conduct an adjudicatory hearing under the rules of the other agency, were its rules suddenly destroyed.

From this conclusion it should not be inferred that the rules of both are uniform or substantially so. Though they basically cover the same matters, and follow similar lines, there is little or no uniformity of detailed provisions which would enable the public dealing with the agencies, including practitioners representing elements of the public, to be secure in applying their knowledge of the rules of the one to a proceeding before the other.

This is demonstrable by identifying certain concrete areas of lack of uniformity. For this purpose the Rules of Practice and Procedure of a third independent regulatory commission, the Federal Communications Commission, with respect to formal adjudicatory hearing procedure (again, like the CAB, having rules in most respects basically similar to those of the FTC), will be compared with the rules of the FTC. By considering a third commission we can obtain a wider sampling of the procedural views of the agencies themselves as reflected in their rules.

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[50] FTC Rules, § 4.13(e), 4.27.

[51] FTC Rules, § 4.27.

In order to avoid immersion in detail, the comparison follows the main outlines of the adjudicatory hearing process, with a sampling examination of both common and differing procedural rules of the two independent regulatory commissions.[52]

It has been said for so long that the idea has gained almost accretive acceptance: common procedural rules for administrative agencies are impracticable due to the divergence of their functions. To the extent certainly that Congress enfolds those functional differences with individual statutory *procedural* requirements, prospecting the possibilities for the uniformity in these respects may well be impracticable. Benefit there may be, nevertheless, in observing the distinctions in procedural method of two functionally different agencies under the acknowledged limitation that analytical review of the statutes involved and of case law that may be pertinent to a given rule of procedure has not been possible to the degree we would wish.[53]

One additional preliminary note: the analysis that follows reflects two basic objects of concern:

(1) The benefit to the government in making widespread interagency use of the most reliable and expeditious procedures developed by the best minds of any given Federal agency. From time to time Congressional committees have urged upon the agencies of government which exercise quasi-judicial functions, and particularly the independent regulatory commissions, the importance of maintaining close liaison with one another so that each might be aware of important substantive and procedural policies adopted by another agency that are of relevant interest; Senator Magnuson in particular has made this point as Chairman of the Senate Interstate and Foreign Commerce Committee, from his vantage point of observing common impacts upon our economy through regu-

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[52] The sampling comparison, it is recognized, should take into consideration material dissimilarities in the duties and functions of the two agencies. However, available time does not permit, and the assigned task of this Committee does not require at this time, any such depth of inquiry which it can be hoped will be provided on future occasions; *e.g.* through continuing efforts of the Administrative Law Section, and as a subject on which the President's Conference on Administrative Procedure is equipped, with the broad representation of government offices included in its membership, to provide constructive assistance.

[53] In the case of the FCC, the procedural references are to the broadcast area of its regulatory powers and duties, as sufficiently illustrative; relatively few phases of the FCC regulatory activities, with respect to telephone and telegraph service supplied in interstate or foreign commerce, become the subject matter of quasi-judicial hearings.

lation by independent commission, considering it highly desirable that each such major commission develop a greater awareness of the regulations of the others. Before and since *Chenery*,[54] a substantial amount of government regulation has been the product of formal adjudicatory hearing proceedings, however generally undesirable that may be.[55]

(2) The benefit to the public interest in making available to the general public and to the bar as a whole, to the extent feasible, a representative set of rules of practice and procedure so that business can be done with the government on a less confusing basis. The public in Dallas, in San Francisco, in Boston, or in Atlanta, is affected continuously by dealings with numerous Federal agencies.

One Federal agency may require by its rules a written notice of intention to appear at a hearing; another may not. Failure in the one instance to file the notice of appearance through ignorance of the rule, can bring an unhappy and premature ending to the proceeding so far as a member of the public is concerned. Another agency has not deemed such a requirement administratively important. The public has a right to ask the question why should it be defaulted before the FCC for not filing an "appearance" but not before the FTC?

As indicated, the remarks below are in the following general outline, in proximate similitude to the progress of the formal hearing:

1. Notice of Hearing and Pleadings
2. Examiner's Pre-hearing Conference
3. Hearing before the Examiner
4. Examiner's Decision
5. Agency Review

I. Notice of Hearing

A. The FCC has a two-ply system of noticing a matter for hearing: (1) The Commission issues an order directing a hearing to be held; (2) by provision of delegation rules the matter then moves directly to the Chief Hearing Examiner who, within the rotational provisions of the Administrative Procedure Act, names a Hearing Examiner to conduct the hearing. Thus, after the designation order by the Commission (FCC Rules, Section 1.140) wherein the reasons and issues are required to be stated, there is further provision for a notice by the Hearing Examiner which sets the time and place of hearing.[56] (FCC Rules, Section 1.103) The notice thus given by the Hearing Examiner must be a "reasonable" notice. Compare the Federal Trade Commission's provision that its notice of hearing shall give the party affected at least thirty days' notice of hearing (FTC Rules, Section 4.4) Moreover, under the FTC Rules it is required that the notice (which consists of a complaint) contain a factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts alleged to be in violation of law. (FTC Rules, Section 4.4) Comparison on this point is difficult because FTC proceedings are in general adversary, whereas only the rare FCC revocation proceeding would partake of that quality. Further, the FTC Rules require that where practical the complaint (hereinafter for comparison purposes referred to as "notice") contain form of order which the FTC has reason to believe should issue if the facts are found to be as alleged in the complaint. (Ibid) Unless the statute so requires, it is questionable whether even the interests of moving along cases, or advising respondents of the enforcement order they can expect if the facts are found against them, warrants the risk of prejudgment inherent in issuing a form of proposed order in advance. The Administrative Procedure Act has recognized the propriety of publishing proposed legislative type orders by an agency but it is submitted that in quasi-judicial proceedings departures of this kind should be considered with more caution. There is no counterpart in FCC practice for such a form of order.

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[54] Securities and Exchange Commission v. Chenery Corporation (Sup. Ct. U.S. 1947), 332 U.S. 194.

[55] For an excellent discussion of the problem, see the practical and constructive article "Policy by Rule or *Ad Hoc* Approach—Which Should It Be?," by Warren E. Baker, in 22 Law and Contemporary Problems 658 (1957).

The FTC provides for a motion for a more definite statement to enable the respondent to answer the notice. Obviously the distinction between the nature of FTC proceeding and that of the ordinary FCC proceeding would account for FCC's omission of such provision, though such a conclusion would less inevitably follow in connection with revocation and cease and desist proceedings ordered by the FCC. However, there is much to be said for adapting such a motion to the original designation order of the FCC in that it could replace the frequency of interlocutory appeals by parties for the purpose of adding, eliminating, modifying and narrowing the issues which have been fixed by the Commission itself and which therefore bind the Hearing Examiner (there being no delegation of authority to him in these respects).

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[56] Notice provisions are specially provided with respect to FCC modification of construction permits and licenses, revocation of such permits and licenses, cease and desist proceedings alleging violation of the Communications Act or the FCC Rules, and suspension of operator licenses. These are not further detailed herein. (FCC Rules, §§ 1.63, 1.76, 1.77 and 1.72).

Service of Notice

Here differences are to be found by virtue of the FCC provision of service by ordinary mail; (FCC Rule, Section 1.140) whereas the FTC provides for service by delivery or *registered mail.* FTC Rules, Section 4.26)

Appearance

The FCC requires the filing of a written appearance, and failure to do so, without good cause shown in the time provided, requires dismissal with prejudice by the Chief Hearing Examiner of the application which had been set for hearing. (FCC Rules, Section 1.140) There is no comparable provision in the FTC rules.

Both the FTC and FCC recognize the right of the party to be represented by attorney, but the FCC rules are preferable in their express requirement that when a party is represented by an attorney of record in a formal proceeding service should be upon the attorney. (FCC Rules, Section 1.56; FTC Rules, Section 4.26 (c)(2))

The requirements of the two agencies differ in their technical specifications with respect to the pleadings and briefs. The size of the paper, the indentations, the effect of signing the documents, are diversely treated. (FTC Rules, Section 4.24; FCC Rules, Sections 1.51, 1.52, 1.53, 1.54, 1.55) The one obvious point of uniformity is that an attorney of record may sign and that he need only sign one copy. (FTC Rules, Section 4.24(e)(1); FCC Rules, Section 1.55)

EXAMINER'S PRE-HEARING CONFERENCE

Under the FCC rules such a conference is discretionary with the agency. (FCC Rules, Section 1.111) Under the FTC rules such a conference becomes obligatory when it appears probable that the hearing will extend for more than three days. (FTC Rules Section 4.8) The FTC rules would appear to be more effective. Though it is common practice in FCC proceedings to hold pre-hearing conferences largely as a matter of course, nevertheless an express rule is desirable for its admonitory effect upon examiners and its notice to parties and their counsel who may not be constant participants or practitioners in FCC proceedings.

There is no great difference in the substance of the matters which the rules of the two agencies provide shall be considered in the pre-hearing conference, but as in other matters, *supra* and *infra,* the wording of the comparable provisions is different, and such differences raise distinctions of substance (FTC Rules, Section 4.8; FCC Rules, Sections 1.111, 1.42(d)) Examples will suffice: The FCC has attempted to guide the Examiner in that which he should try to accomplish at the pre-hearing conferences by spelling out in greater detail the subjects on which *he should* seek agreement of the parties in the interest of expediting the hearing; it has also added "amplification" of the issues to the otherwise common "simplification" and "clarification" of the issues. (Anomaly is noticeable here, in view of the indisposition of the FCC to delegate to its examiners elsewhere in its rules any actual authority with respect to the issues, hence the examiner has no real pre-hearing responsibility in this regard.) The FCC rules, *supra,* also add the requirement that the Examiner record any special rules he deems necessary to govern the course of the proceeding period. Both rules, *supra,* contain a requirement that the Hearing Examiner enter on the record an order which recites the action taken as a result of the pre-hearing conference, such order to control the subsequent course of the proceeding unless modified at the hearing.

Hearing Before the Examiner

Each agency provides for a stenographic report of proceedings; (copy available to the private party on payment of costs: FCC Rules, Section 1.121, 1.129).

Under the FCC rules depositions are permitted to be taken freely unless a party or a witness makes reasonable objection by motion. (FCC Rules, Sections 1.121, 1.122, 1.123) However, the FCC rules prohibit the taking of a deposition for purposes of discovery. (FCC Rules, Section 1.121) [57]

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[57] But see FCC Rules, § 1.123 to the effect that after a party serves notice for taking a deposition, the other party or witness to be examined may object by motion for good cause, and the Commission, inter alia, may order that a deposition "may be taken only on written interrogatory."

Between the reference provisions of Rules § 1.121 and § 1.123 a significant ambiguity appears to exist. An important modern-day purpose in taking a deposition is

The FTC is more strict in that is requires permission of the examiner to be obtained before an application for deposition will be granted, but surprisingly no standards are provided therein, such as materiality, relevancy, scope. (FTC Rules, Section 4.10)

Obviously here two federal agencies have taken converse stands in their rules upon the freedom of the use of depositions, the FCC being far more liberal except as relates to its preclusion of discovery practice. Considering the enforcement nature of most FTC proceedings it would seem more appropriate that the liberality of the FCC practice be provided in order to assure fairness of treatment of respondents. The FCC moreover takes the traditional legal approach (though not necessarily the traditional administrative approach) of safeguarding the probative character of the evidentiary record by providing for the exclusion of depositions or parts thereof on the basis of competent objection made in the course of the hearing to their introduction in evidence on the grounds of competence, relevancy, materiality and for other reasons (unless waived at the time the deposition was taken). (FCC Rules, Section 1.129) On the other hand the FTC rules, somewhat more recent in point of time (1961) contain virtually no provisions in this regard, and indeed virtually open the door wide for admission of depositions into the record. (FTC Rules, Section 4.10(d))

The FTC rules lay down no very specific guidelines on this subject, being content generally to rest upon relevancy, materiality and reliability. (FTC Rules, Section 4.12(b)) The FCC rules on the other hand offer much more in the way of guidance and restrictiveness by stating, with limited express exceptions, that rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings, reserving only the right to relax the rules in the interest of the ends of justice. (FCC Rules, Section 1.171)

The FCC rules in this connection seem preferable in their protection of the parties by greater emphasis upon probative evidence while preserving appropriately the public interest factor underlying the administrative agency concept. Moreover it is probable

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to ascertain previously undisclosed or unknown facts. But the FCC in providing for depositions, which it freely permits, has excluded by its general rule those taken for the purpose of discovery, without making known the reason or extent of the limitation; moreover it has elsewhere implicitly recognized the propriety of written interrogatories, the discovery purpose of which is usual. As the rules are written, a considerable burden appears to rest with the party taking the deposition to determine what the subjects that may be pursued in the course of the deposition.

that the FCC approach tends to expedite proceedings by placing responsibility upon examiners to give primary attention to the ordinary rules of evidence. (FCC Rules, Section 1.171) Both agencies warn against cumulative evidence. (FTC Rules Section 2.12(b); FCC Rules, Section 1.172) The FTC rules contain two helpful provisions, the first of which has a counterpart in the FCC rules. The first deals with official notice of facts and permits opportunity to disprove a fact noticed by the agency as a promise of its decision but not of record. (FTC Rules, Section 4.12(c); FCC Rules, Section 1.158) The second FTC provision is that rulings on an objection shall appear in the record. (FTC Rules, Section 4.12(d))

INTERLOCUTORY APPEALS

The FTC does not allow an interlocutory appeal from a ruling of the Hearing Examiner unless the party first obtains the permission of the Commission to entertain the same. (FTC Rules, Section 4.18; it should be noted that exceptions are made with respect to issuance of subpoenas, and suspension or disbarment of an attorney from a proceeding). A page limit of 10 pages is imposed upon request for such permission and the request for permission must be filed within 5 days after notice of the examiner's ruling. The FTC rules establish three tests that must be met for an interlocutory appeal; *e.g.* novel and substantial questions of law, ability of the Commission to determine the question without reference to the record (which is still before the Examiner) and finally that Commission action would speed the ultimate decision of the case.[58]

It would appear that only the latter test may necessarily involve a determination on the record itself, and it is to be supposed that the Commission here has in mind avoiding reversible error on the part of the Examiner, which would later require remand of the case to him. FCC has no comparable rule which would appear to lead to a greater volume of interlocutory filings during the course of the hearing, and a greater amount of delay. This comment is subject to reservations, however, as to the merit of the second FTC test given above, *e.g.*, interlocutory review may be unrealistic if the appeal is removed from the context of the record which is relevant to the point at issue in the interlocutory appeal.

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[58] *Ibid.*

In the case of the FCC a substantial amount of the interlocutory appeals relate to requests for enlargement, modification, or elimination of issues set forth in the Commission's own hearing designation order (FCC Rules, Section 1.141); and therefore to some extent these may be placed in analogy to the motion practice of the FTC already noted which is intended to make more definite the FTC complaint (herein referred to as notice). These FCC interlocutory appeals are required to be made by motion within 15 days after the issues are first published in the Federal Register, unless good cause is shown for later filing. (Ibid)

EXAMINER'S DECISION

For the assistance of the Examiner, and the protection of the parties, all parties are permitted to file proposed findings of facts and conclusions, briefs or memoranda of law at the close of the hearing. (FTC Rules, Section 4.17; FCC Rules, Section 1.149). Such must be filed within 20 days after the close of the record unless the examiner etxends the time, in the case of the FCC (FCC Rules, Section 1.149); the comparable provision of the FTC Rules requires the filing of the same at the time the record is closed or within such reasonable time afterward as the Examiner sets. (FTC Rules, Section 4.17). The FTC provision in this regard also permits the filing of a proposed orded by the parties. The FTC rules further require that the record show the Hearing Examiner's ruling on each proposed finding and conclusion, although this significant provision (which notwithstanding it seems merely to carry out the requirements of the Administrative Procedure Act is frequently not specifically observed by hearing examiners) is made cloudy by an exception contained in the Rule which makes the requirement inapplicable in any case wherein the Examiner's order disposing of the proceedings "otherwise informs" the parties of the action he has taken on such proposals. This exception of course can be construed so broadly as to destroy the merit of the basic provision. (FTC Rules, Section 4.17) The FCC Rules contain no provision requiring the examiner to dispose findings and conclusions in specific fashion.

Both agencies require the filing by the Examiner of an initial decision which shall be his decision of the adjudicatory proceeding. (FTC Rules, Section 4.19; FCC Rules, Section 1.151) The FCC excepts from this requirement cases in which it directs the certification of the record for purposes of its own initial or final decision, for imperative and unavoidable reasons or because a presiding officer becomes unavailable to the Commission following the taking of evidence. (FCC Rules, Section 1.151 (b), (c)) The FTC Rules show no comparable exception. The FTC Rules require the initial decision to be filed within 90 days after taking of evidence unless the Commission extends the time. (FTC Rules, Section 4.19) The FCC has no comparable provision, though it would appear to have distinct administrative advantages in tending to expedite the issuance of the Examiner's decisions; it would of course require diligence by the parties in filing of their proposed findings and conclusions.

Both agencies provide for the automatic effectiveness of the Examiner's decisions when no party objects thereto, but there are essential differences in the time within which such exceptions shall be made and when such automatic finality shall occur if there is no filed exception. (FCC Rules, Section 1.151; FTC Rules, Section 4.19). Both agencies' rules, however, provide in all events for review by the Commission on its own motion should it choose to do so, the time periods for such motion action being substantially different, however. (FTC Rules, Section 4.19; FCC Rules, Section 1.153)

Agency Review

The FTC rules assume to the Commission a power somewhat analogous to that exercised by the courts in considering whether they will entertain petitions for rehearing, such rules providing that the Commission need not hear objections to an initial decision unless the respondent files a petition for review which the FTC finds presents substantial questions and should be determined by it for a proper disposition of the proceedings and protection of the rights of the parties. (FTC Rules, Section 4.20) There is an exception where two or more FTC members believe the petition should be granted, whereupon it must be. The FTC rules do not state whether a denial of a petition for review upon this discretionary basis would be accompanied with any reasons, and it is assumed it would not be since the initial decision of the Hearing Examiner thereupon becomes the decision of the Commission and apparently judicial review would effectively be of the

Examiner's decision.[59] The FCC has no comparable provision.[60]

Sixty-seven days are permitted by the FTC for the sequence of filing briefs in support of exceptions, answering briefs, and reply briefs. (FTC Rules, Section 4.21) The comparable minimum period provided by the FCC is 40 days, for filing of exceptions and reply. (FCC Rules, Section 1.153) FTC rules reserve some discretion relative to permitting oral argument before the Commission (FTC Rules, Section 4.21); the FCC rules extend the right of oral argument if requested. (FCC Rules, Section 1.154; the 1961 amendments, *supra,* 47 U.S.C. Section 409, remove the rights to oral argument, but there has been no implementation thereof in the FCC rules.

In its decision of the proceeding the FCC rules permit the Commission to limit its review to those findings and conclusions of the examiner to which the parties took proper exceptions. (FCC Rules, Section 1.155) The final decision of the Commission is required to contain findings of fact, conclusions, and reasons on all material issues of fact, law or discretion presented on the record; and to rule on each relevant and material exception filed. (FCC Rules, Section 1.157)

The FTC rules are less clear as to the content of the Commission's decision. Consideration of those parts of the cited record presented by the parties' briefs is required "so far as necessary to resolve the issues presented"; and the Commission will adopt, modify, or set aside the findings, conclusions and order of the examiner, and include in its decision a statement of the reasons or basis "for its action." Whether the last three words relate back to the findings and conclusions adopted, modified or set aside, so that specific reasons are contained in the decision with respect thereto, or whether the reasons so required apply only to what the Commission considers the controlling factors for its action, may be arguable. In any event, the FTC rules require less notice, through the contents of the decision, to the parties as to the Commission's disposition of their exceptions, than is provided in the FCC rules. (FTC Rules, Section 4.22)

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[59] *Ibid.*

[60] In accordance with 1961 amendments to the Communications Act, the FCC now has statutory authority to impose similar preliminary conditions (47 U.S.C. § 155); these amendments are unusual in that they permit the FCC to delegate to boards of employees the review of examiners' decisions which had theretofore been recognized by the United States Supreme Court as possessing "probative force" as a result of the purpose of Section 11 of the Administrative Procedure Act to increase the importance of the role of examiners in the administrative process. (Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).) As of the date this report is written (approximately nine months after the enactment of the 1961 Amendments) the FCC rules do not reflect these statutory procedural changes; consequently as of this time the FCC rules, as distinguished from the FTC rules, allow appeal to the Commission directly from the Examiner's decision as a matter of right.

There is no express provision in the FTC rules for petitions for rehearing or reconsideration of its final decision, though there is some provision for reopening of proceedings, apparently on its own motion and not as a procedure afforded by rule to the parties affected. (FTC Rules, § 4.29) The FCC rules provide for the filing of petitions for reconsideration or rehearing within 30 days of the release of the final decision. (FCC Rules, § 1.91)

Conclusion

It appears clear that each of the significant steps of procedural due process with respect to the three independent regulatory commissions reviewed has been provided in greater or lesser detail by their procedural rules, and that the points of substantive differences are few.

It appears equally clear that the surprising extent of the procedural variances of the three commissions—demonstrated above and requiring no re-emphasis here—is in great measure unnecessary. The words "great measure" are qualifying words in recognition of the fact that the report herein, if it possesses sufficient merit, should be reviewed against existing statutes, court decisions, and basic policy decisions of the agencies, from which some of the variances may have been moulded.

However, in these days when few in the administrative law field discern curbs of strength, in the statutory or judicial materials, upon administrative discretion, it is fair to assume that such discretion can be made equally manifest in rules of practice and procedure which, in most respects, are uniform among agencies as they perform their quasi-judicial functions.

Cornelius B. Kennedy
John L. FitzGerald
Committee on Uniform Rules
for Agency Adjudication

REGULATING COMMUNICATIONS IN THE "PUBLIC INTEREST"

I. Membership of Committee

The undersigned was requested to serve as Chairman of the subject committee in a communication mailed by Raoul Berger, Chairman of the Section, under date of August 15, 1961. The appointment was accepted on August 18, and a committee[1] was formed consisting of three Vice-Chairmen[2] and twenty-six members.[3]

In appointing committee members, an attempt was made (1) to secure lawyers from private practice and from the Federal Communications Commission having expertise with respect to the various areas of Communications Law; (2) to secure replacements for persons who had served for a number of years in the past; and (3) to have no more than one member from the same law firm. The membership of the 1960-61 Committee is set forth at 13 Administrative Law Review 89.

It is recommended that next year members be appointed on the basis of three-year staggered terms.

II. Sub-Committees

At the Annual Meeting of the Council held on August 27-28, 1960, the Communications Committee submitted an Annual Report which recommended that the proposed Radio Frequency Allocation Act (H.R. 8426, 86th Congress) be opposed (12 Administrative Law Bulletin 207-216). This recommendation was adopted at the Annual Meeting of the Section held on August 29-30, 1960 (13 Administrative Law Review 60-61 and 73-74).

At the Mid-Year Meeting of the ABA House of Delegates in

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[1] All of whom practice in D.C. unless otherwise noted. Mr. Nail resigned on April 20, 1962.

[2] One for Broadcast Services, Edgar W. Holtz; one for Common Carrier Services, Jack Werner; and one for Safety and Special Radio Services, Joseph E. Keller.

[3] Douglas A. Anello; George E. Ashley, New York City; Warren E. Baker; Philip Bergson; Arthur Blooston; Leon R. Brooks; Irving Brownstein; Kenneth A. Cox; Edgar F. Czarra, Jr.; William J. Dempsey; Paul Dobin; Robert L. Heald; Norman E. Jorgensen; Joseph M. Kittner; Robert D. L'Heureux; Joseph A. McDonald; John H. Midlen; Howard Monderer; Edward P. Morgan; Edwin S. Nail; W. Theodore Pierson; E. Stratford Smith; Peter Shuebruk, New York City; Bernard Strassburg; Lester W. Spillane, San Francisco; and George H. Revercomb, Charleston, W.Va.

February of 1961, it was resolved that the Association "oppose the enactment of H.R. 8426, 86th Congress, or any similar bill which may be subsequently introduced"[4] and that "the Section of Administrative Law be authorized to act for the Association in opposing the enactment of such legislation." (Volume 86 of the Reports of the American Bar Association, at pages 139 and 298).

In view of the above-noted history, a sub-committee was formed at the first meeting of this Committee held on October 20, 1961, with respect to the pending Radio Frequency Act bill (H.R. 1162, 87th Congress). The sub-committee consisted of Warren Baker (Chairman), Edgar F. Czarra, Jr., Irving Brownstein and Robert D. L'Heureux.

In addition, the following persons were appointed Chairmen of the following sub-committees: A Study of the "Public Interest" Standard as Applied by the FCC (Edgar W. Holtz); A Study of the Tall Tower Problem (Robert L. Heald); and A Study of the Various Satellite Bills (Edward S. Nail). These sub-committees were established as a result of suggestions received from members of the full Committee and the Chairman of the Section. Each sub-committee Chairman was requested to appoint sub-committee members, as needed.

In addition, Philip Bergson agreed to serve as Chairman of a sub-committee to review legislation for the purpose of bringing to the attention of the full Committee any pertinent pending bills.

III. RADIO FREQUENCY ACT (H.R. 1162, 87TH CONGRESS)

H.R. 1162, 87th Congress, which is identical to H.R. 8426, 86th Congress, is objectionable primarily because of substantial ambiguities in definitions and the lack of certain procedural safeguards which are dealt with in detail at 12 Administrative Law Bulletin 207. The pertinent sub-committee conferred with the author of the legislation (Congressman Oren Harris) who indicated a desire for the submission of substitute language which would be agreeable to the American Bar Association.

The sub-committee thereupon re-examined the bill and determined that it would be an extensive task to re-draft the bill so as to arrive at acceptable language. The sub-committee did not feel such a task would be worthwhile at this time in view of the fact that the staff of the House Committee on Interstate and Foreign Commerce stated that no action will be taken with respect to the proposed legislation until experience is obtained regarding the recent appointment of Dr. Irvin Stewart as Director of Telecommunications Management with "authority to oversee assignments of frequencies among government users of the radio spectrum and to help formulate policy in the telecommunications field" (Broadcasting Magazine, April 2, 1962, page 60).

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[4] H.R. 8426 died with the 86th Congress, but the same bill was introduced in the 87th Congress as H.R. 1162.

It is recommended that next year's Committee give consideration to any bills introduced in the 88th Congress similar to H.R. 1162, 87th Congress, and H.R. 8246, 86th Congress.

IV. Other Legislation

Although the Committee has no specific recommendations regarding pending legislation other than the above-noted Radio Frequency Act, it is deemed appropriate to mention the following matters.

On August 31, 1961, the President signed Public Law 87-192 which amended the Communications Act of 1934 so as to repeal Section 5(c) and to revise Sections 5(d), 405 and 409. (See House Report Nos. 723 and 996, 87th Congress.)

This legislation enacted into law some of the features of the President's Reorganization Plan No. 2 of 1961 which dealt with the FCC and which was rejected by the House in June of 1961.

On May 2, 1962, the House of Representatives passed H.R. 8031 (87th Congress), which would amend the Communications Act of 1934 so as to require that all television receivers shipped in interstate commerce or imported into the United States be equipped at the time of manufacture to receive all television channels (VHF and UHF). The FCC committed itself, in the event the legislation is enacted, to withhold action in 8 "deintermixture" proceedings initiated on July 27, 1961 pending an assessment over a "sufficient period of time of the effectiveness of the measure in achieving the Commission's overall allocation goals" (108 Cong. Rec. 6880). It is expected that the Senate Commerce Committee, which has already held hearings, will consider the bill in executive session during May of 1962.

On May 1, 1962, the President signed Public Law 87-447, which provides $32 million to educational stations on a matching-fund basis, to be administered by the Secretary of Health, Education and Welfare with a maximum limit for any one state of $1 million.

On May 3, 1962, the House of Representatives passed H.R. 11040 which would create a private corporation to own and operate a communications satellite system. It is expected that the Senate will give early consideration to this matter.

V. STUDY OF THE TALL TOWER PROBLEM

On June 12, 1961, the Federal Aviation Agency adopted regulations dealing with the subject of air hazards which became effective July 15, 1961. On August 25, 1961, Section 626.50 of the Regulations was amended to provide that "Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended."

Two public hearings are scheduled to be held in the near future, one pertaining to proposed television towers in the St. Paul-Minneapolis area and one pertaining to proposed television towers in the San Francisco-Oakland area.

It is apparent that the new FAA air hazard procedures pose many unresolved problems, including the following, which should be studied in the future:

1. The question of the ultimate authority to grant or deny permits to construct tall broadcast towers. In spite of the above-noted amended FAA Regulation 626.50, certain aeronautical interests contend that the sole authority to determine whether a tall tower should be authorized resides in the Federal Aviation Agency rather than the Federal Communications Commission.
2. The hearing procedures to be followed before the FAA. The FAA Regulations provide that the public hearing is a fact-finding proceeding not subject to the provisions of the Administrative Procedure Act (Section 626.51).
3. The question of review of FAA decisions. If the FAA determines that a tower proposal constitutes an air hazard, does the applicant go to Court or to the Federal Communications Commission?
4. While the new FAA Regulations give tacit recognition to the need to weigh the relative merits of aeronautical and broadcast interests (Section 626.75(b)), there are indications that broadcast interests are considered to be secondary in importance by the FAA.

VI. FCC Review Board

It is expected that the Commission will release in the near future a Report and Order establishing a Review Board in accordance with the 1961 amendments to the Communications Act of 1934 (Public Law 87-192).

It is expected that the Review Board, which will consist of at least three Commission employees, will be delegated the function of taking original action on (1) most of the interlocutory matters now handled by the Commission and the Motions Commissioner and (2) several of the interlocutory matters now delegated to the Chief Hearing Examiner. In addition, the Review Board will hear oral argument on and rule upon exceptions to Initial Decisions in specified categories of hearing cases which will probably include the following: all AM and FM proceedings except specified categories such as revocations, renewals, etc.; TV translator proceedings; applications of common carriers filed under Title II of the Act; proceedings involving complaints against common carriers for recovery of overcharges; safety and special radio services proceedings; and proceedings involving suspension of operators' permits. The Commission will retain discretion (1) to have any of the cases falling within these delegated areas certified to it or to a panel of Commissioners for decision and (2) to assign to the Review Board proceedings falling in the general areas not delegated (such as television hearings).

In preparing a Report and Order in connection with the establishment of the Review Board, the Commission has consulted with the Practice and Procedure Committee of Federal Communications Bar Association. Accordingly, with respect to any questions arising in the future concerning the Review Board, the views of the FCBA Committee on Practice and Procedure should be obtained.

VII. Multiplicity of Communications Committees

It is recommended that next year a sub-committee be created to determine if some method can be established to co-ordinate the activities of the following committees of the American Bar Association and its affiliated organizations which deal with communications: ABA Standing Committee on Communications (M. J. Galvin, Ch., Union Depot Building, St. Paul 1, Minnesota); ABA Adm. Law Section National Committee on Agency-Section Liaison

(John F. Cushman, Vice Ch. for FCC Liaison, FCC, Washington 25, D.C.); ABA Adm. Law Section Special Committee on Communications (R. Russell Eagan, Ch., World Center Building, Washington 6, D.C.); ABA International and Comparative Law Section Committee on International Communications (Joseph A. McDonald, Ch., 1240 19th Street, N.W., Washington 6, D.C.); ABA Public Utility Law Section General Committee on Communications (Theodore F. Brophy, Ch., 730 3rd Avenue, New York 17, New York); and Federal Communications Bar Association (Harold S. Mott, President, 710 14th Street, N.W., Washington 5, D.C.).

VIII. Application by the Federal Communications Commission of the Statutory Standard of "Public Interest, Convenience or Necessity"

On August 23, 1961, the Chairman of the Section addressed a memorandum to the Committee Chairmen dealing with Aviation, Communications, Gas and Electric Power, Interstate Commerce and Securities soliciting their opinions as to the feasibility of a project of examining whether the concepts of "public interest" and "public convenience and necessity" are capable of more precise definition.

The views of all members of the Communications Committee were solicited with respect to this matter which was discussed at a committee meeting held Friday, October 20, 1961. In March of 1962, Mr. Holtz supplied the Chairman with a memorandum dealing with this subject. No other specific views or suggestions were received by the undersigned.

Attached as Appendix A hereof is an initial attempt to outline the basic background facts and questions involved in such a study which might be said to be more appropriately the subject of a book than a committee report. The attached comments have not been circulated to committee members, and they are offered only as a suggested base for further study by succeeding committees.

APPENDIX A

APPLICATION BY THE FEDERAL COMMUNICATIONS COMMISSION OF THE STATUTORY STANDARD OF "PUBLIC INTEREST, CONVENIENCE OR NECESSITY"

Although two recent Law Review articles point up the need for more precise definitions of the "public interest" standard as applied by administrative agencies,[1] the problem is neither new nor novel. For example, the report of the American Bar Association Standing Committee on Radio Law presented to and approved by the 52nd Annual Meeting held in Memphis, Tennessee during October of 1929, stated as follows (Reports of ABA, Vol. 55 at page 456):

> "One of the most difficult questions constantly confronting the [Federal Radio] Commission is the proper interpretation and application of the test of 'public interest, convenience or necessity.' "

Even prior to the issuance of the above-noted report, the Federal Radio Commission acknowledged criticism directed at it for failing to give content to the phrase "public interest, convenience or necessity." On August 23, 1928, it issued a statement in response to demands for a more precise definition of the vague standard.[2]

The Radio Act of 1927 was the first federal statute to apply the standard of "public interest, convenience or necessity" to the regulation of broadcasting. At the time of the "birth" of broadcasting in the fall of 1920 when station KDKA, Pittsburgh, broadcast the Harding-Cox election returns, the only federal statute pertaining to the regulation of broadcasting was the Radio Act of 1912 (Public Law 264, 62nd Congress).

Under the terms of the Radio Act of 1912, interstate radio communication was forbidden "except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor." No standard was set out as a guide for granting or denying licenses.

The Radio Act of 1912 was designed in fact to regulate the use of frequencies for radio telegraph purposes in connection with navigation and contained no express provision relating to broadcasting. However, following the advent of broadcasting in the fall of 1920, the Secretary of Commerce (then Herbert Hoover) commenced issuing licenses in December of 1921. Although the Radio Act of 1912 gave the Secretary no express powers to do so, he issued regulations, effective December 21, 1921, assigning specific frequencies for specific uses (833 kc, for broadcasting news, concerts, lectures and such matters and 618 kc for broadcasting crop reports and weather forecasts).[3]

The Secretary in effect enlisted the cooperation of broadcasters by holding four National Radio Conferences in 1922, 1923, 1924 and 1925.

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[1] "The Public Interest Undefined," Arthur S. Miller, *Journal of Public Law,* Vol. 10, No. 2 and "The Federal Administrative Agencies: The Need for Better Definition of Standards," Henry J. Friendly, *Harvard Law Review,* Vol. 75, No. 5.

[2] See Appendix F(6) of the Second Annual Report of the Federal Radio Commission (1928) at pages 166-170.

[3] Radio Service Bulletin No. 57, January 1926 at page 10.

In 1923, the Secretary issued detailed regulations [4] which, to a remarkable extent, have remained the foundation of standard broadcast (AM) allocations to the present day.

By the time of the Third National Radio Conference held in 1924, there were over 500 broadcast stations licensed to operate on specific frequencies with specified hours of operation and operating powers. However, in two short years there was to be a termination to what has been described as the "experiment in industrial self-regulation" and a complete breakdown of the effective radio regulation by the Department of Commerce which led to "the chaos of 1926."

The basic defect of the Radio Act of 1912 was clearly pinpointed as far back as November of 1912 when Attorney General Wickersham issued an opinion advising the Secretary of Commerce and Labor that the issuance of a license was mandatory if the applicant was a citizen of the United States (29 Op. Atty. Gen. 579). Nevertheless, Secretary of Commerce Herbert Hoover refused in 1921 to grant an application of the Intercity Radio Company for a license to engage in the business of wireless telegraphy in New York City on the ground there was no frequency available that would not interfere with stations already licensed. In 1923, the Court of Custom Appeals held that the Secretary had no authority or discretion to refuse a license to the Intercity Radio Company (*Hoover* v. *Intercity Radio Company,* 286 Fed. 1003, 1923).

This decision led to a constant fear during the years 1923-1925 that lack of cooperation on the part of a few broadcasters would upset the entire program of self-regulation involved in the regulations issued by the Secretary of Commerce. The long-anticipated calamity occurred in 1926 when the Government unsuccessfully attempted to prosecute the owner of a broadcast station for broadcasting on a frequency other than that specified in his license and during hours beyond those set forth in the license (*United States* v. *Zenith Radio Corporation,* 12 F. 2d 614. See also *Carmichael* v. *Anderson,* 14 F. 2d 166). This caused the Secretary of Commerce to query the Department of Justice as to the extent of his authority under the Radio Act of 1912. On July 8, 1926, an opinion was rendered by Acting Attorney General Donovan to the effect that under the Act of 1912, the Secretary had no power to determine or restrict the frequency, power or hours of operation of a radio station or even to limit the term of its license (35 Op. Atty. Gen. 126). As a result, the Secretary of Commerce on July 9, 1926 virtually abandoned regulatory control of broadcasting and issued licenses to all applicants for whatever frequency, hours or power requested. Between July 9, 1926 and the enactment of the Radio Act of 1927 on February 23, 1927, some 200 new broadcast stations went on the air while existing stations changed frequencies and increased power at will. The result was a chaos which will long be remembered as the "breakdown of the law," in which radio reception was virtually ruined.

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[4] Radio Service Bulletin No. 73, May 1923.

The chaos accelerated attempts which had been made in the 66th, 67th and 68th Congresses to pass a new law dealing with radio and led to the enactment by the 69th Congress of the Radio Act of 1927 which established the standard of "public interest, convenience or necessity" as the basis upon which the Commission was authorized to grant or deny broadcast licenses. When the Radio Act of 1927 was replaced by the Communications Act of 1934, the provisions of the Radio Act of 1927 were virtually re-enacted as Title III of the Communications Act.

Although words such as "public interest," "public convenience" and "public necessity" undoubtedly may be found in judicial opinions and statutes long before the Radio Act of 1927, it appears that the first statute requiring a certificate or license of "public convenience and necessity" or its equivalent was enacted in New York in 1892 respecting the requirement of such certificates for railroads.[5] In 1895, a statute of New York required such certificates for street railways.[6]

In the Transportation Act of 1920, which amended the Interstate Commerce Act, the device of a certificate of convenience and necessity was first applied to the regulation of interstate commerce.[7]

An early attempt to give content to the "public interest" standard set forth in the Radio Act of 1927 occurred in 1933 when Chief Justice Hughes, speaking for an unanimous court, upheld the constitutionality of the standard and stated as follows (*Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company,* 289 U.S. 266 at page 385):

> "In granting licenses, the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. * * * The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages and service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment the equities of existing stations undoubtedly demand consideration. They are not to be victims of official favoritism. But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the Commission in exercising its authority to make a 'fair and equitable allocation.' "

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[5] "The Standard of 'Public Interest, Convenience and Necessity' " by Louis G. Caldwell in the August 1931 issue of the Radio Bulletin of the School of Law of the Catholic University of America. Congress used the term "consistent with the interest of the U.S." in 1799 (1 Statute 613, 615).

[6] *Ibid.*

[7] *Ibid.*

In 1940, Justice Roberts, speaking for an unanimous court, stated that the standard of "public convenience, interest and necessity" "* * * is given meaning and contour by the other provisions of the statute and the subject matter with which it deals" (*FCC* v. *Sanders Bros.,* 309 U.S. 470 at page 473).

Let us now turn to an attempt to determine to what extent decisions of the FRC, the FCC and the Courts have given a precise meaning to the "public interest" standard.

A logical initial question is whether any significance attaches to the fact that the standard is expressed in slightly different forms throughout the Communications Act of 1934. The standard is variously referred to as follows:

1. The "public interest" (Sections 201(b), 215(a), 221(a), 222(c)(1), 222(e)(1)-(3), 415(a)(4), 319(c) and 315(c)).
2. The "public necessity" (Section 303(f)).
3. The "public convenience and necessity" (Section 214(a)).
4. The "public convenience or necessity" (Section 303(f)).
5. The "interest of public convenience and necessity" (Section 214(d)).
6. The "public convenience, interest or necessity" (Sections 303 and 307(a)).
7. The "public interest, convenience and necessity" (Sections 307(d), 309(a), 316(a) and 319(d)).
8. The "public interest, convenience or necessity" (Sections 307(d), 311(b) and 311(c)(3)).

In the opinion of the undersigned, this initial question must be answered in the negative.

A second basic question is the extent to which the meaning of the "public interest" standard, however expressed, varies as it is applied to various functions of the Commission. Although this question will not be explored in detail herein, it seems clear that the standard takes on a slightly different context with respect to the Commission's legislative or rule making functions as compared to the Commission's quasi-judicial or adjudicatory functions. Also, the standard takes on different meanings in connection with actions and decisions of the Commission (whether rule making or adjudicatory) relating to different services such as broadcast, common carrier and safety and special services. For example, in the common carrier field, as contrasted to the broadcast field, the "public interest" is served by preventing uneconomic duplication and precludes a grant of an application where existing facilities are adequate. This report will attempt only to deal, on a first-draft skeleton basis, with the application of the standard respecting the quasi-judicial function of the Commission in passing upon broadcast applications.

In passing upon broadcast applications of all types,[8] the Commission may grant such applications only if it finds that "public interest, convenience or necessity" would be served thereby. If the Commission can make such a finding based on the information before it at the time, it has the power to grant the application without a hearing. Otherwise, the Commission, which does not have the power to deny an application without a hearing,[9] must designate the application for hearing following which a decision must be rendered on the basis of the record evidence as applied to the statutory standard. Any final Commission action denying an application is subject to appeal, as a matter of right (Section 402). Although the original appeal section [10] gave the Court of Appeals the right to substitute its judgment for that of the Commission, this standard of appeal was abolished in 1930, and the Court's function has since been limited to determining whether the Commission's action was within the scope of its statutory authority, accorded with all procedural requirements and was not arbitrary. By and large, reversals of the Commission by the Courts have been confined since 1930 to cases involving procedural defects with the result that the cases have been remanded to the Commission for further reconsideration in the light of the Court's opinion, with the requirement at times that further hearings be held prior to the reconsideration. In practically all instances, the Commission, upon reconsideration, has reaffirmed its original action.

For the purpose of discussing how the Commission has applied the "public interest" standard, broadcast applications may be grouped in three general categories: those which do not conflict with other pending applications or existing stations, those which conflict with existing stations and those which conflict with other pending applications. Some applications fall in the latter two categories. In all three categories, the burden of establishing that a grant would serve the "public interest" is generally placed upon the applicant. In a revocation of license proceeding and in a modification ordered by the Commission, the burden of proof is placed by the statute on the Commission. Also the burden may be placed by the FCC on a party opposing the grant of an application.[11]

With respect to the first category of applications, the initial determination made by the Commission is whether the applicant possesses the basic statutory qualifications of a licensee. Generally speaking, if an applicant has demonstrated that he possesses the requisite legal, technical and financial qualifications, and the application poses no question as to the good faith attempt of the applicant to ascertain and fulfill the program needs and interests of the area and population to be served, the application will be granted without a hearing. An applicant is legally qualified if he meets the requirements set forth in Section 310 of the Act. He is financially qualified if he demonstrates he has available sufficient cash to (1) build the station and (2) operate the station for a reasonable period (usually in the order of three months). He is technically qualified if he specifies a frequency and facilities which (1) comply with all pertinent Rules and Regulations, (2) do not constitute a hazard to air navigation and (3) comply with the Section 307(b) mandate of providing a "fair, efficient and equitable distribution" of service.

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[8] For example, applications to construct new stations, to modify existing authorizations, to renew existing authorizations and to assign or transfer existing authorizations.

[9] In certain instances, an application which does not comply with the Rules may be dismissed and thus, in effect, denied without a hearing. U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[10] Section 16 of the Radio Act of 1927.

[11] In some instances where the Commission has ordered renewal hearings, it has assumed the burden of going forward but not the burden of proof.

All applicants in the first category must also demonstrate compliance with the Commission's Rules and policies regarding multiple ownership of broadcast stations. The pertinent Rules specify that it is contrary to the "public interest" for any person (natural or corporate) to have an interest in more than one broadcast station of the same class (AM, FM or TV) serving substantially the same area or to have interests in more than seven AM stations (Rule 3.35), seven FM stations (Rule 3.240) or seven television stations (no more than five of which may be in the VHF band) (Rule 3.636).[12] Further, applicants must demonstrate compliance with all other pertinent Rules of the Commission (such as those respecting AM network affiliations, Rules 3.131-3.138) and must be free of any character blemish or past serious violation of Commission Rules and policies and statutory mandates.[13]

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[12] In this connection, it is noted that even though an applicant complies with the above-noted limitations concerning interests in the maximum number of stations and does not propose to acquire an interest in a second station of the same class serving substantially the same area, a basic qualification issue may arise because of his ownership interests in existing stations involving an overlap of service area with the proposed station which poses a hearing question as to whether there would be a "concentration of control" contrary to the public interest.

[13] For example, § 315 of the Act states that a licensee has "an obligation to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Also, §§ 1304, 1343 and 1464 of Title 18 of the United States Code prohibit the broadcasting of (1) information concerning lotteries, (2) fraud by radio and (3) obscene, indecent or profane language. With respect to the Commission's right to review the past program record of an applicant, there is an abundance of literature. Reference is made to the First Amendment of the Federal Constitution, § 326 of the Act, KFKB Broadcasting Association v. Federal Radio Commission, 47 F. 2d 670, Trinity Methodist Church, South v. Federal Radio Commission, 62 F. 2d 850, and the Commission's Program Policy Statement released July 29, 1960 (Public Notice 60-970). See also 22 RR 417

Turning now to the second category of applicants, those which propose operations which would conflict with existing stations, the most common point of conflict is that of interference to the service areas of existing stations. All of the questions discussed above are equally applicable. In addition, such applications pose the question of whether there is a greater public need for the new service or for the existing service which would be destroyed. Unless the interference is *de minimus,* the issue must be resolved by means of the hearing process.

In the AM and FM category of cases, existing stations are protected to specified contours or imaginary lines of specified equal signal strength. In the past, the Commission, in adjudicatory radio cases, has usually found that the public interest would be better served by authorizing the proposed station than by protecting the existing service. Recent indications, including the speech of the Chairman given at the National Association of Broadcasters Convention in Chicago in April of 1962, point to a tendency to be more restrictive in the future.[13a]

With respect to television, existing stations are protected through the device of specifying in the Rules (1) minimum mileage separation requirements respecting co-channel and adjacent channel separations and (2) maximum requirements respecting operating powers and antenna heights. No one may apply for authority to build a television station unless he specifies a frequency set forth in the table of assignments based on the above-noted principles (Rule 3.606). In considering rule making petitions to amend its table of television assignments, the Commission has permitted very few exceptions to its minimum mileage separations.

A separate but related question involved in the second category of applications relates to economic injury threatened to existing stations as contrasted to electrical interference. In the early days of the Federal Radio Commission, a standard question posed in hearing cases was whether there was any "need" for an additional station in the community proposed, and several applications were denied on the basis that no such need was demonstrated in view of the presence of existing stations. However, the Commission later changed its attitude and took the position that under the free enterprise system it should grant applications independent of the "need" for an additional station in the community,[14] where no Section 307(b) question is present.

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re policy re horse racing information; 21 RR 781 re comparison of promise versus performance; and 1 RR 91:301 re editorializing and treatment of controversial issues.

[13a] On May 10, 1962, the Commission placed a freeze on the processing of AM applications. (See Report and Order released May 10, 1962 (FCC 62-516) and FCC Public Notice B-20050 dated May 10, 1962.)

[14] Compare Goss v. FCC, 76 F. 2d 507 (1933) and Easton Publishing Co. v. FCC, 175 W. 2d 344 (1949). See also page 6 hereof re the common carrier principle of preventing uneconomic duplication of facilities.

The present law is clear that economic injury threatened to existing stations by an operation proposed in a pending application constitutes a basis for achieving "standing" and that upon proper allegations must be considered on the merits in deciding whether to grant or deny the application concerned. In this connection, reference is made to *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940); *Carroll Broadcasting Company* v. *FCC,* 258 F. 2d 440 (1958); *WHAS, Inc.,* 31 FCC 273 (1961); and *Carter Mt. Transmission Corp.,* 22 RR 193 (1962).[15] The latter involved injury to a television station threatened by a common carrier application.

Let us consider now the third and last category of applications, those which are mutually exclusive with other pending applications in view of the fact that because of technical limitations, only one of two or more applications can be granted. Everything said above with respect to the other two categories of applications applies to this category with equal force. In addition, a basic comparative question is posed respecting qualified applicants[16] which must be resolved by applying to the facts of the case the standard of "public interest, convenience or necessity." This category of applications constitutes by far the largest body of case law applying the statutory "public interest" standard.

The standard "comparative issue" specified by the Commission in comparative proceedings has read as follows in recent years:

> "To determine on a comparative basis which of the proposed operations would better serve the public interest, convenience and necessity in light of the significant differences between the applicants as to:
>
> (a) The background and experience of each bearing on its ability to own and operate the proposed * * * broadcast station.
>
> (b) The proposals of each with respect to management and operation of the proposed * * * broadcast station.
>
> (c) The programming service proposed in each of the above-captioned applications."

Over the years, the Commission has developed a number of comparative areas which are used as tools to assess the relative merits and demerits of competing applicants. These comparative areas include the following criteria: local residence, integration of ownership and management, participation in civic activities, diversification of business backgrounds, broadcast experience, past broadcast records, proposed programming, preparation and planning, diversification of ownership of media of mass communications, policies, studios and equipment and staffs.

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[15] Compare Kaiser Hawaiian Village Television, Inc., 22 FCC, 750 (1957). Economic injury as grounds for "standing" and for consideration on the merits is not confined to existing broadcast stations, see Philco Corp. v. FCC 257 F. 2d 656, *cert. den.* 358 U.S. 946 (1958); and Clarksburg Pub. Co. v. FCC, 225 F. 2d 511 (1956).

[16] It is well established that if one of the mutually-exclusive applicants is basically disqualified, it is not entitled to comparative consideration wth the remaining qualified applicants. Simmons v. FCC, 145 F. 2d 578 (1944).

At times, issues in addition to the standard comparative issue are specified which may deal with any of the basic qualification questions discussed above or which may consist of more or less "special" comparative issues (such as areas and populations to be served, interference to existing stations, etc.). As noted above (footnote 16), any applicant who fails to establish that he possesses the basic statutory qualifications is not entitled to comparative consideration. Also, if a Section 307(b) issue is added (fair, equitable and efficient distribution of broadcast service) and it is determined that Town A has a greater need for an additional broadcast service of the type proposed, then only those applicants who propose to serve Town A are entitled to comparative consideration.

With respect to the resolution of the standard comparative issue, it must be acknowledged that it is impossible, on the basis of past Commission and Court decisions, to establish precise guidelines so that on a given set of facts one may predict with any degree of certainty the ultimate ruling of the Commission. The difficulty lies in the multitude of different fact situations presented and in determining the relative weight and importance to be attached to the various individual comparative areas. However, in the opinion of the undersigned, all of the various *individual* comparative areas which are usually involved may be grouped into the following four *composite* comparative areas, which in turn must be assessed on an over-all basis in selecting the winning applicant.

The first composite comparative area is the degree to which each applicant is aware of the program needs and desires of the population to be served. The individual comparative areas which must be weighed in arriving at a comparative evaluation of the applicants in this regard include the following: local residence, broadcast experience, preparation and planning, civic participation and diversification of business interests.

The second of the four composite comparative areas is the degree to which each applicant proposed a program schedule which is responsive to the needs and desires of the populations to be served. A determination of this question calls for a comparative evaluation of the proposed program schedules advanced by the respective applicants without violating the prohibitions of the First Amendment and Section 326 of the Act. A detailed analysis of how the Commission has compared applicants in this regard over the years is beyond the scope of this report. The Commission does not attempt to compare the relative merits of proposed programs insofar as content is concerned. In most cases, the Commission concludes that each applicant proposes a schedule which is "well-balanced" and designed to meet the diverse needs and interests of the population concerned.[17] In reaching this judgment, the Commission examines the proposals to determine if they include programs in various categories designed to meet the diverse interests of listeners and viewers. The present program portion (Section IV) of the FCC's application forms dates back to 1946 and specifies the following "types" of programs: entertainment, news, talks, discussion, educational, agricultural and religious.

The Commission has under consideration revising the program portion of its application form and has stated in its July 29, 1960 Program Policy Statement as follows:

> "The major elements usually necessary to meet the public interest, needs the desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming."

Some of the cases in which the Commission has awarded preferences for proposed programs, which usually relate to local, live programs [18] to be produced by the proposed stations as distinguished from network or recorded programs, are as follows: *Sarkes Tarzian, Inc.,* 17 RR 905 (1959); *Denver Broadcasting Co.,* 19 RR 1205 (1960); *Standard Broadcasting Co.,* 20 RR 89 (1960); *Triad Television Corp.,* 16 RR 501 (1958); *WJR, The Goodwill Station, Inc.,* 16 RR 321 (1958) and 9 RR 227 (1054); *Grand Prairie Broadcasting Co.,* 14 RR 1121 (1957); and *WORZ, Inc.,* 12 RR 1157 (1957).

This third of the four composite comparative areas is the degree of assurance afforded by each applicant that its proposals will in fact be carried out. The individual comparative areas which must be weighed in this regard are past broadcast records, preparation and planning, integration of ownership and management, staffs, policies and studios and equipment.

The last of the four composite comparative areas is the degree to which each applicant proposes to diversify the ownership of media of mass communications. Normally, if all other things are equal, the Commission will favor the applicant proposing the greatest degree of diversification. However, where other factors are not equal, there is no precise criteria by which to gauge the relative importance of superiority in the diversification area as compared to superiority in other areas.

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[17] For example, see Great Lakes Broadcasting Co. v. FCC, 289 F. 2d 754 (1960).

[18] For example, see Hi-Line Broadcasting Co., 13 RR 1017 (1957).

In a typical comparative case, the Commission weighs the over-all relative merits and demerits of applicants with respect to the above-noted four composite areas in arriving at its determination as to which of several applications should be granted pursuant to the standard of "public interest, convenience and necessity." In choosing among qualified mutually-exclusive applicants, the Commission has a wide area of discretion. The Supreme Court has stated that the statutory standard of "public interest" serves as a "supple instrument for the exercise of discretion," by the Commission (*FCC* v. *WJR,* 337 U.S. 265, 283 (1949).[19] This and other decisions to the same effect plus the well-known principle that administrative agencies are not bound by the rule of *stare decisis* establish that under the present law, the Commission can not be required by the Courts to define with any greater precision than it has in the past the relative weight to be assessed to the various comparative areas in choosing between qualified applicants. Since it is also clear that the Commission can not be arbitrary or capricious in choosing among qualified applicants without being reversed by the Courts,[20] the question may well be asked as to whether any attempt should be made by legislative or other means to confine the discretion of future Commissioners in accordance with firm guidelines, assuming that meaningful fixed standards can be drafted.[21] Yet, many voices have been heard complaining of the fact that the Commission has not consistently applied the same weight to the same comparative criteria in different cases. For example, a 1958 study prepared by Robert S. McMahon for the House Committee on Interstate and Foreign Commerce entitled "Regulation of Broadcasting," stated as follows (Page 161 of Subcommittee Print):

> 'The present criteria employed by the Commission in its adjudicatory proceedings should be better defined, or new standards should be provided. The word "diversification," for instance, has no meaning whatsoever under present case policy in the Com-

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[19] See also Scripps-Howard Radio v. FCC, 189 F.2d 677 (1951), *cert. den.* 342 U.S. 830 (1951);Chicago Board of Trade v. U.S., 223 F.2d 348 (1955) and Johnston Broadcasting Co. v. FCC, 175 F. 2d 351 (1949).

[20] Johnston Broadcasting Co. v. FCC, 175 F. 2d 351 (1949).

[21] Since the creation of the Federal Communications Commission in 1934 to May 10, 1962, there have been 34 different Commissioners, one of whom served from 1937 to 1944 and from 1956 to date. The FCC is composed of seven Commissioners appointed to staggered seven year terms.

> mission (compare the manner in which this criterion was employed in, for example, the following cases: *The Enterprise Company,* 9 RR 816; *Radio Fort Wayne, Inc.,* 9 RR 1221; *McClatchy Broadcasting Company,* 9 RR 1190; *St. Louis Telecast, Inc.,* 12 RR 1289; *Indianapolis Broadcasting, Inc.,* 12 RR 883; *Biscayne Television Corporation,* 11 RR 1113). Likewise, the criterion of integration of ownership and management has no more meaning than that of diversification. (Compare *Radio Wisconsin,* 19 RR 1224, *Beachview Broadcasting Corporation,* 11 RR 939, *Biscayne Television Corporation,* 11 RR 1113). Likewise, the criterion of inte- *Journal,* vol. 66, January 1957, p. 365, re: "Diversification and the Public Interest: Administrative Responsibility of the FCC.)"

It appears doubtful that the thesis expressed above that the criteria of "diversification" and "integration" have no established meaning "whatsoever" is 100% accurate. However, it is believed that all lawyers practicing before the Commission will readily admit to an inability to forecast the outcome of any comparative hearing with absolute accuracy. Yet, most would agree that definite meanings and rationales can be ascribed to the various comparative criteria. What can not be predicted with certainty is the relative over-all weight which will be assigned to the various comparative criteria by a majority of the Commission in any given case, each of which deals with *proposed* operations of broadcast stations. But isn't it equally true that the ultimate decision can not be predicted regarding a great percentage of law suits which deal with the application of legal principles to events which have taken place?

Nevertheless, a continuing attempt should be made by the Bar and the FCC to define with greater precision than has occurred in the past the "public interest" standard. Perhaps the expected requirement that decisions released by the soon-to-be created FCC Review Board (See Part VI of Annual Report) must be signed by the author will lead to such a result. It is hoped that this report, together with the reports to be submitted by the committees dealing with the CAB, FPC, ICC and SEC, will be of some help in this regard.

R. Russell Eagan, *Chairman*
Committee on Communications

PROCEDURAL TECHNIQUES IN FOOD AND DRUG ADMINISTRATION PROCEEDINGS

It is time for re-examination of the procedures by which the Food and Drug Administration (FDA), operating in the Department of Health, Education and Welfare, administers the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 *et seq.*, 52 Stat. 1040). The agency has recently been given vast new powers under the Food Additives Amendment of 1958 and the Color Additives Amendment of 1960. Other bills giving even more authority are now before Congress. The entire history of this agency, not unlike others, has been one of increasing regulatory activity. We need not decide whether this is good or bad. The fact that there is a substantial increase in the regulatory activities creates a need for clearly defined, fair and expeditious procedure.

Experience suggests that the increasing grant of substantive regulatory powers now requires an overall re-examination of procedural safeguards afforded by the FDA. Actually, there has been surprisingly little litigation or controversy over matters of basic procedure. Partly this is because manufacturers and producers who deal with the agency find it easier to comply with FDA demands than to participate in long drawn out, expensive litigation, liable to damage seriously the good will of the company. Partly this is because of the nature of the subject matter dealt with. Traditionally, where questions of public health are involved, as for example in connection with cancer, laymen and the courts have been most sympathetic to government regulation. And even though perhaps half of the substantive provisions of the Act deal *not* with safety or the public health but rather with economic deception and misbranding, the overtones of public health set the regulatory tenor.

Basic problems of procedures have been raised by the change in the thrust of administrative activities from the originally intended purpose of "policing" (using court technique of seizure, injunction and criminal prosecution) to "licensing" activities requiring prior approval before the sale or distribution of the product involved. Interestingly enough, the original justification for "premarketing" approval was the serious threat to health stemming from the marketing of a dangerous or poisonous substance. Now, however, the prior sanction requirement deals with all dangers covered by the Act, including economic deception, adulteration and misbranding.[1]

This shift of emphasis, as noted by leading lawyers in the field, is continuing and is increasingly affecting procedure.[2] Most of the contemplated procedure under the Federal Food, Drug and Cosmetic Act utilizes rule making techniques rather than adjudication; however, with the increase in the "prior approval" type of regulation, much of the so-called rule making is indistinguishable from adjudicatory licensing proceedings. And the new procedures, though more comprehensive than before, still suffer certain procedural weaknesses which are hangovers from rule making theories and techniques.

For example, one may request that a tolerance be established for a particular pesticide chemical which then enables the producer to market his product. These are considered regulations, but to all intents and purposes, the "regulation" is a license to that particular person to distribute his particular pesticide chemical under specifically prescribed circumstances. The same is true for a "new drug application" under Section 505 of the Act. If the Secretary approves it, the application becomes effective, and the owner of the drug has, in short, a license for its use. So also under the Color Additives and Food Additives Amendments,[3] a person may request the Secretary, by petition, to issue a regulation prescribing the conditions under which the additive may be used. The additive may be so common as to affect an entire industry or it may be of such a unique and specialized nature that only one manufacturer in the nation would normally benefit from the issuance of the regulation. All of these "licensing" activities would seem to require a full and fair adjudicatory-type proceeding, no matter what the label given to the function.

Another important aspect of this shift of emphasis to licensing is the shifting of the burden of proof to the individual to justify in advance his right to manufacture or market a particular food additive, new drug or color additive. No longer is the burden entirely upon the government to go into court to show the dangerous, unsafe, adulterated or otherwise improper condition of the marketed product. Now the burden is upon the manufacturer, or distributor in some cases, to prove in advance the safety of his product, or in other cases, the efficacy of his chemical, or that his claims are not deceptive or false. This, it is submitted makes imperative the requirement that the FDA procedures be designed to process the license applications in an expeditious and fair manner, consistent with due process of law.

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[1] Food Additives Amendment, § 409(c)(3)(B); Color Additives Amendment, § 706(b)(6). Even the new proposed legislation requiring a premarketing showing on safety of cosmetics makes no distinction between health and economic deception. See proposed new §§ 605(d)(3) of H.R. 11582, introduced May 3, 1962, 87th Cong., 2d Sess. (Harris Bill).

[2] The so-called "Kefauver Bill," § 1552, provides for prior licensing of producers of prescription drugs. See proposed § 508(c). H.R. 11582, referred to in footnote 1, requires prior approval of both cosmetics and devices.

[3] §§ 706 (376) and 409 (348), the section cited in the brackets is the citation to Title 21 of the U.S. Code.

Nevertheless, as will appear from the later material, vestiges of rule making attitudes and the assertion of broad discretionary powers remain. Partly this is because Congress continued to use rule making terminology (where it never intended normal rule making procedure);[4] partly because the agency is used to the broad discretion available to it in rule making proceedings and thus, is reluctant to sacrifice such discretion to formalized adjudicatory hearing procedures.

It will be the purpose of this report to analyze in some detail the regulatory activities of the FDA and the procedures applicable to them. Where appropriate, tentative suggestions as to possible improvements or alternatives will be described.

I. Regulatory Activities

A. *Adjudication*

Both under the statute and in practice, there is little recognized adjudicatory activity under the Federal Food, Drug and Cosmetic Act. Section 404(a) (344(a)) of the Act provides for the issuance in certain cases of temporary permits to manufacturers of certain types of food which, by reason of contamination in the locality during manufacture, may be injurious to health. Section 404(b) of the Act authorizes the Secretary to suspend immediately on notice any temporary permit issued under this authority if it is found that the conditions of the permit have been violated. The holder is entitled to apply for the reinstatement of the permit and the Secretary is required to hold a hearing on the reinstatement request. This is considered adjudicatory by the agency, but there is no special procedural provision for the hearing under this section and so far as can be determined, a hearing has never been held.

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[4] See *e.g.* the Food Additives Section, 409(b) (348(b)); "Any person may . . . file with the Secretary a petition proposing the issuance of a regulation prescribing the conditions under which such additive may be safely used."

Section 505 (355) of the Act, the new drug section, provides that no person shall introduce into interstate commerce any "new drug" unless he has filed an application therefor. Section 505(c) provides that the new drug application will become effective within 60 days unless prior to that time the Secretary, by written notice, postpones the effective date for a period of not more than 180 days. Section 505(d) provides that the Secretary shall refuse to permit the application to become effective if "after due notice to the applicant" and "opportunity for a hearing" he is not satisfied that certain standards having to do with the safety of the drug or the reliability of the methods of manufacture have been met. Section 505(e) also gives the Secretary the authority to suspend the effectiveness of an existing application "after due notice and opportunity for hearing if the Secretary finds that new tests now show the drug to be unsafe or if there are untrue statements appearing in the application. Both of these activities are considered adjudicatory.

FDA recognizes as adjudicatory proceedings for suspension and revocation of a milk shipment permit under the Import Milk Act (21 U.S.C. 141, 143) and proceedings having to do with the shipment in interstate commerce of a dangerous caustic or corrosive substance under Section 5(a) of the Federal Caustic Poison Act (15 U.S.C. 405(a)). So far as appears, no actual proceedings have been held under these provisions.

There are a few other matters which we believe to be adjudication, such as (1) an application for certification of a batch of harmless coal-tar colors for use in food under Section 406(b) (346(b)); (2) an application for certification of a batch of coal-tar colors for use in drugs, under Section 504 (354); (3) an application for certification of batches of drugs composed wholly or partly of insulin (Section 506 (356)); (4) an application for certification of a batch of drugs composed wholly or partly of specified antibiotics under Section 507(a) (357(a)); (5) an application for certification of a batch of coal-tar colors for use in cosmetics under Section 604 (364). The FDA apparently does not agree that this is adjudication and simply treats these as administrative actions. According to the agency, "If the analysis indicates compliance with the law and regulations, a certificate is granted. If not, the certificate is refused, and it is contrary to law to introduce such articles into interstate commerce." [5] Considering that the refusal to issue the certificate can destroy the economic value of that batch, the procedure is certainly cavalier. Apparently, in practice and with consent of the industry, this informal type of administrative action suffices. As a matter of procedure it leaves much to be desired.[6]

B. *Rule Making Activities*

The rule making functions of the FDA are extensive and complicated. First, the FDA issues general statements of policy and interpretive rulings defining in detail certain statutory language. There are also procedural and organizational rules adopted.

A second area of rule making occurs in the establishment of substantive standards of safety, identity, labeling and packaging. For example, there is the food standards section, Section 401 (341); interpretive provisions on adulterated food under Section 402 (342); and misbranded food under Section 403 (343); regulations for the issuance of emergency permits to manufacturers who manufacture food, which may, by reason of contamination in the locality, be injurious to health under Section 404 (344); regulations prescribing the conditions under which a food additive may be safely used under Section 409 (348); the issuance of regulations prescribing appropriate tests and methods of assay for the purpose of determining the strength, quality and purity of certain drugs under Section 501(b) (351(b)); regulations setting forth the packaging and labeling requirements for certain drugs or devices under Section 502(b)(2) (352(b)(2)). Then there are other substantive rule making activities under Section 502 (352), such as designating certain drugs as "habit forming," (subsection (d)), formulating exemptions from requirements of giving "adequate directions for use" (subsection (f)), or labeling drugs properly which are liable to deterioration (subsection (h)); finally, the establishing of regulations for listing certain color additives as safe for use in food, drugs or cosmetics under Section 706(a) and (b) (376(a)(b)).

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[5] Survey and Study of Administrative Organization, Procedure and Practice in the Federal Agencies, Part 4, Department of Health, Education and Welfare, p. 439 (House of Representatives, 85th Cong. 1st Sess., 1957).

[6] The certification service can be suspended if petitioner is found to have defrauded the government, or misrepresented his records. 21 C.F.R. 9, 10, dealing with the suspension of certification of coal tar colors provides for *no* procedure. Section 164.9 of 21 C.F.R. dealing with suspension of service for certifying drugs containing insulin, and § 146.6 of 21 C.F.R. dealing with suspension of service for certification of antibiotic drugs, both provide for notice and hearing. Presumably, this would be adjudicatory.

These are examples of regulatory activities directed towards establishing substantive standards of safety, identity, labeling, packaging or directions for use. They constitute the heart of the FDA's regulatory activities.

Another major substantive area of rule making under the Act is the establishment of "exemptions," that is, setting forth the numerous situations to which the general requirements will not apply. A few typical examples may be mentioned. Under the food misbranding situations, the Secretary may exempt certain foods from labeling requirements having to do with the naming of the ingredients, where full labeling is "impracticable" (Section 403(i) (343(i)). Under Section 408(c) (346(c)) the Secretary can by regulation exempt from the necessity of obtaining a tolerance certain poisonous or deleterious pesticide chemicals "when such a tolerance is not necessary to protect the public health." By regulation, the Secretary may exempt certain small packages of drugs from the labeling provisions of Section 502 (352) where compliance is not necessary for the protection of the public health.

Under Section 602 (362), dealing with misbranded cosmetics, exemptions can be established from some of the labeling requirements. All of these "exemption" cases follow most informal procedures.

Finally, the FDA is empowered to establish "tolerances." For example, Section 406 (346) provides that when certain poisonous or deleterious substances are added to food which cannot be avoided in good manufacturing practice, the Secretary shall promulgate regulations limiting the quantity therein or thereon to the extent he finds this necessary for the protection of the public health. Also under Section 408 (346(a)) very extensive provisions set forth the establishment of tolerances for pesticide chemicals which may be used in or on raw agricultural commodities.

II. APPLICABLE PROCEDURES

A. *Introduction*

As can be seen from the above, the regulatory activities cover a wide variety of fields, and utilize varying regulatory techniques, such as requests for new drug applications, petition for issuance of food standards, certification of coal-tar batches, establishment of pesticide chemical tolerances, and regulations exempting certain products from general requirements. As might be expected, the procedure is as varied as the areas of regulation.

Some procedural requirements, as for example the processing of a new drug application, afford a thorough hearing. Other procedural requirements, such as for establishing exemptions, are minimal. The various applicable procedures are described below in order generally of decreasing complexity.

B. *Hearings on New Drug Applications (Section 505)*

Any person may file a new drug application. It shall become effective after 60 days unless the Secretary in writing postpones the date (for not more than 180 days). Section 505(d) (355(d)) provides that the Secretary shall refuse to permit the application to become effective, if after due notice and an opportunity for hearing, he makes one of four adverse findings. Also under Section 505(e) (355(e)), an existing new drug application may be suspended if, after due notice and an opportunity for hearing, the Secretary finds that new tests or experience show that the drug is unsafe or that the application contains any untrue statement of a material fact.

Under either section, the hearing examiner would have full hearing authority and would be appointed under Section 11 of the Administrative Procedure Act. A written record is kept and parties may file full written arguments. A "tentative order" with full findings of fact is issued by the Examiner, and then after exceptions, the Commissioner issues a final order based on the record. (See Section 130.14-130.28 of 21 C.F.R.)

Basically, this is a full hearing with all procedural rights reasonably well protected. As will be seen later, no other Section of the Act affords such full protection, or at least, not as interpreted by the FDA.

C. *Hearings on Food Additive Petitions (Section 409)*[7]

Section 409(b) (348(b)) provides that any person may file a petition for a food additive regulation, and the Secretary must, within 30 days, publish notice of the proposed regulation. After 90 days (or 180 if extended), the Secretary must either establish the regulation or deny the petition, giving reasons. Under Section 409(d), the Secretary may propose a food additive regulation on his own initiative, and after 30 days, may, by order, establish a regulation.

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[7] § 409 was added to the Act by the Food Additives Amendment of 1958 (Public Law 929, 85th Cong., September 6, 1958).

Within 30 days after issuance of the order, Section 409(f) (348(f)) provides that "any person adversely affected" may file "objections with the Secretary, specifying with particularity the provisions deemed objectionable, stating reasonable grounds therefor and requesting a public hearing." After notice and hearing, the Secretary shall issue an order based upon a "fair evaluation of the entire record" and shall set forth in detail his findings and conclusions.

These hearings are conducted by a Section 11 APA hearing examiner, who has extensive hearing powers (See Section 121.57-121.65 of 21 C.F.R.). He, however, does not issue a "tentative" order; rather he certifies the transcript to the Commissioner, who prepares a "proposed order." Then after exceptions and written argument, the Commissioner prepares the final order. Except for some general problems discussed under Setion 701, *infra,* this section appears to be reasonably complete so far as procedure is concerned. There is some question as to how valuable a hearing under subsection (f) would be if the Secretary simply denied the original petition. This is discussed generally, *infra* under Section 701 procedure.

D. *Proceedings on Establishing Tolerances for Pesticide Chemicals (Section 408)*[8]

The procedural requirements for the establishment of tolerances for pesticide chemicals used in or on raw agricultural commodities or the establishment of exemptions are very similar to the requirements for food additive regulations. Section 408(d) (346(a)(d)) limits more severely the class of persons who may file a petition requesting a tolerance or an exemption; and perhaps requires greater details and underlying data. However, once filed and once the Secretary of Agriculture certifies that the pesticide chemical is "useful" (a statutory prerequisite), the petition must be granted or referred to an "advisory committee." After a report from the advisory committee, the Secretary must establish a tolerance or exempt the chemical from the necessity of a tolerance.

Section 408(d)(5) (346a(d)(5)) provides that "any person adversely affected" by a regulation may file objections, and the petitioner has an opportunity to reply. The hearing will be similar to that afforded under Section 409, except that the report of the Advisory Committee becomes part of the record. Again a Section 11 APA hearing examiner is used, though he does not issue any "tentative" decision (See 120.24 of C.F.R.).

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[8] § 408 was added to the Act by the Miller Pesticide Chemicals Amendment, Public Law 518, 83rd Cong., July 22, 1954.

Section 408 proceedings appear to involve many indicia of adjudicatory proceedings. For example, the data submitted to the Secretary in support of a petition is considered "confidential" until publication of the regulation (Section 408(f) (346a(f)). This would normally suggest that the relief granted will probably benefit the petitioner mainly. This is reinforced by the requirement that petitioner submit an application with the Secretary of Agriculture to register the pesticide chemical as an economic poison. There is also interestingly enough the requirement that the Secretary of Agriculture, before he can *refuse* to issue a certificate of usefulness, must provide the petitioner a "prompt hearing" (Section 408(1) (346a(1)). Certainly all of these factors would suggest that the regulatory process involved is "private licensing."

E. *Section 701 Procedures*

The heart of the Act, procedurally, is Section 701 (371) where the general procedural requirements are found for many of the rule making activities.[9] This section expressly applies to the following rule making activities: [10]

(1) Section 401 (341), the fixing or establishing for any food a reasonable definition and standards of identity, quality and fill of container; (2) Section 403(j) (343(j)) labeling requirements for food for special dietary uses; (3) Section 404(a) (344(a)) issuance of temporary permits to manufacturers, processors, or packers of certain classes of food likely to be injurious to health; (4) Section 406 (346) the establishment of a tolerance necessary for the protection of public health in connection with poisonous or deleterious substances added to food; (5) Section 501 (351(b)), the prescribing of appropriate tests or methods of assay with which to determine the strength, quality or impurity of certain drugs;

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[9] The language of § 701(e) (371(e)) stems from the Hale Amendment of 1956, Public Law No. 905, 84th Cong. See also earlier procedure under Hale Amendment of 1954, Public Law 335, 83d Cong., which applied to § 401 (341), the food standards section.

[10] § 507(f) (357(f)), dealing with the certification of certain antibiotic drugs, has its own internal procedures, but they are almost identical to requirements of § 701. So also procedure under 506(c) (356(c)), dealing with certification of drugs containing insulin, expressly applies the procedure of § 701 in some cases.

(6) Section 502(d) (352(d)), the finding that certain "habit forming" drugs are misbranded unless properly labeled; (7) Section 502(h) (352(h)), the finding that certain drugs, liable to deterioration, are misbranded unless properly labeled so as to show the precautions necessary for the protection of the public health; (8) Section 706(b) (376(b)), the listing of color additives for use in food, drugs and cosmetics; (9) Section 706(c) (376(c)), the certification, with safe diluents or without diluents, of batches of color additives listed pursuant to 706(b).

For each of these rule making activities Section 701 procedure applies. It is this section which needs most serious re-examination. There is little doubt that the activities generally defined are "rule making." Section 701 requires that the rule be determined on the record after hearing. Thus, they are "formal" rule making proceedings and fall under the requirements of Sections 7 and 8 of the Administrative Procedure Act. Moreover, many of the issues are hotly controverted and contested industry fights, *e.g.*, bread standards hearing, thus making even more essential a full and fair hearing.

An immediately difficult problem concerns the case where the Secretary either refuses to initiate rule making requested by an "interested person" or by failing to act at all, accomplishes the same result. Section 701(e) (371(e)) provides that an action for the issuance, amendment, or repeal of a regulation shall be begun by a proposal of the Secretary himself "by petition of any interested person showing reasonable grounds therefor." The section provides that the Secretary "shall" publish the proposal and "shall afford all interested persons an opportunity to present their views thereon, orally or in writing."

In some cases, the Secretary has simply refused to act, thus frustrating the intended purpose of Section 701(e). While arbitrary time limits should be reluctantly imposed, it may be advisable in this case to impose some time limit upon continued inactivity.

The Secretary has authority under the statute to refuse to publish the proposal if the grounds stated are not "reasonable." It is not clear how the public could proceed against the Secretary if he refused to act at all or if he denied the request to institute rule making for whatever grounds he chose to give. The discretion of the Secretary is broad. One court has held that since discretion is involved, an action for mandamus or for declaratory relief would not lie in the courts.[11]

On the other hand, an abuse of the discretion should be reviewable probably in a federal District Court. This might be based on continued refusal to act; or based on arbitrariness for refusal to publish a proposal that clearly stated "reasonable grounds." To permit an effective court review, the Act should be amended to require that if the Secretary determines not to institute the rule making proceedings, he must issue an order incorporating therein a concise general statement of the basis for the conclusion but not simply quoting the statutory language.

The next procedural problem of 701 arises at the conclusion of the first stage in the proceedings. After all interested parties have a chance to present their views, the Secretary can either adopt the proposed regulation or deny the petition, giving his reasons. The Act nowhere states how detailed his denial must be. The Secretary may simply deny the petition paraphrasing the language of the statute.

Under Section 701(e)(2), a person "adversely affected" by the refusal to issue the order, as for example, the petitioner, could file objections to the order, specifying "with particularity" the provisions "deemed objectionable," "stating the grounds therefor, and requesting a public hearing upon such objections." This, however, could be a rather useless gesture. The issue in the objector's hearing would be the reasonableness of the Secretary's refusal to adopt or amend the rules. If, as would not be unlikely, the Secretary merely concluded that there was no "need" for, or general usefulness of, the proposed regulation, the burden upon the objector in the hearing would be almost impossible to bear.

Even if the Secretary does adopt a new or amended standard, there still are difficult procedural problems. Section 701(e)(2), as indicated above, gives a right to a hearing to any person adversely affected by the order. Recent case decisions cast some doubt as to how effective this right to hearing is. In a recent article by Vincent Kleinfeld, appearing in the *Food, Drug, Cosmetic Law Journal*,[12] he discusses at some length the question of whether or not the Secretary has the discretion to refuse to hold hearings under Section 701(e)(2) after objections have been filed. Recent cases appear to support the administrator's discretion in refusing to hold hearings, at least where only questions of law are involved.[13]

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[11] Cook Chocolate Co. v. Miller, 72 F. Supp. 573 (D.D.C. 1947); See Levine, *The Cook Chocolate Case,* 4 Food Drug Cosmetic L.Q., 172 (1949).

[12] Kleinfeld, *The Hale Amendment—A Pyrrhic Victory?,* 16 Food, Drug, Cosmetic L. J. 150 (1961).

Mr. Kleinfeld suggests that if any factual issue is raised in the objections, then there would have to be a full hearing. This seems crystal clear under the Act. What is unclear, however, is how far the discretion of the Secretary goes. Many issues phrased as factual questions can be interpreted by the Secretary as questions of law.

For example, there is currently pending a hearing under Section 701 concerning a standard for "whole fish flour." The proponents of the regulation want to legalize the marketing in the United States of a fish flour made by grinding and drying the entire fish, including heads, tails, fins, viscera and intestinal contents. Others, opposing this regulation, urged that the food standard should require that the flour be made from cleaned fish after discarding the portions found by some to be objectionable. After studying the comments, the FDA expressed the opinion that the portions of the fish, including heads, tails and intestinal contents would not "normally be regarded as acceptable for human food in the United States" and that the product was therefore "filthy" and adulterated under the provisions of the act.[14]

The FDA thus proposed the adoption of a standard of identity for fish flour which required that it be made from cleaned fish. Objections were filed and the Commissioner has now ordered a hearing. Obviously, there are questions here as to what the public considers "acceptable for human food" and what is "filthy" under the Act. Many would consider these questions of fact. But the Secretary could have held that as a matter of law fish food composed of the whole fish is "filthy" and thus adulterated under the Act. Using this technique, the right to a hearing under Section 701(e)(2) could be entirely frustrated, and any right of appeal would be in part nullified by a seriously deficient evidentiary record.

Other basic problems concern the hearing, itself. The first problem has to do with the appointment of a hearing examiner.

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[13] Dyestuffs and Chemicals, Inc. v. Flemming, 271 F. 2d 281 (8th Cir. 1959); Cf. Certified Color Industry Committee v. Flemming, 283 F. 2d 622 (2d Cir. 1960).

[14] In passing, it might be noted that the issue involved here seems purely one of aesthetics and not health and safety, nor misrepresentation. It seems to be conceded that the product would be completely safe and wholesome; as a matter of fact, it would provide a high source of protein available at a low price.

Clearly Section 701 requires a formal rule making proceeding with the rules to be made "on the record after opportunity for an agency hearing." Thus, according to Section 4 of the Administrative Procedure Act, the requirements of Section 7 and 8 of that Act are precisely applicable. So the first question is who shall preside. Section 11 of the Administrative Procedure Act indicates that a hearing examiner should be used, one who is assigned to cases in rotation and one who "shall perform no duties inconsistent with their duties and responsibilities as examiners."

Cases under the Federal Food, Drug and Cosmetic Act are not exempted from requirements of Section 7 concerning the use of an independent hearing examiner,[15] but the practice, as a matter of fact, in hearings under Section 107(e) is to appoint as examiner a staff attorney in the Food and Drug Division of the General Counsel's Office of HEW, and have another attorney from the same division act as FDA counsel. Sometimes the FDA counsel who is supporting the proposed regulations, has a superior position in the Food and Drug Division to that of the examiner who presides. Thus, the hearing examiner, who has broad powers to accept or reject evidence and to govern the conduct of the case, is in a compromised position. Where the FDA and industry are in sharp disagreement, the inappropriateness of the potential dual role is obvious.

Interestingly enough, in hearings under Section 505(d) (355(d)), dealing with a new drug application, under Section 409(f) (348(f)), dealing with food additives, or proceedings under Section 408(d) (346(d)), regarding the establishment of a tolerance of a pesticide chemical, the agency rules provide that the hearing examiner shall be appointed pursuant to the provisions of Section 11 of the Administrative Procedure Act.[16] Concededly these activities have more of the elements of adjudication than do normal proceedings under Section 701. But the difference is one of degree. It is difficult to explain why policy as well as Sections 7, 8 and 11 of the APA do not dictate the need for an independent hearing examiner appointed pursuant to Section 11 of the APA. If not true in all cases, at least the need seems obvious where the controversy is sharp and the proceedings of not too general a character.

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[15] § 12 of the APA provides that no "subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." Since almost all relevant FDA procedural provisions have been passed subsequent to the APA, without expressly modifying the APA, all sections of the APA are fully applicable to FDA proceedings.

[16] 21 C.F.R. 130.17, 121.57, 120.7.

Except for proceedings under Section 505(b), dealing with new drug applications, the examiner never issues an "initial" or "tentative" decision in proceedings under these sections. Always he certifies the record to the Commissioner who issues a "proposed order,"[17] which decision is subject to exceptions and written argument. Thus, another difficulty emerges: the problem of the institutional decision.

The decision, even though rule making, is supposed to be made on the record. The Commissioner or the Secretary, as the case may be, is too busy to acquaint himself personally with the details of the record and the policy and legal arguments involved. He must, of necessity, rely upon his subordinates in the particular department or bureau involved to prepare for him summaries of the relevant evidence and arguments so that he can make the necessary judgment. Thus, the FDA divisions and bureaus and the FDA division in the General Counsel's Office play a great part in the formulation of the final rule as adopted by the Commissioner.

The problem, of course, is that the petitioners or private parties are never thoroughly aware of all the bases of decision, since they do not know all the points being urged by the staff upon the Commissioner. In general rule making proceedings this is perhaps inevitable. In proceedings of limited scope or in what are really "licensing" proceedings, there is considerable doubt that such procedure is fair.

The case of *Willapoint Oysters, Inc.* v. *Ewing*, 174 F.2d 676 (9th Cir. 1949) is generally conceded to support the flexible procedures used by the FDA under Section 701, though in fact most of the statutory language now applicable varies substantially from that applicable to the *Willapoint* case. According to that case (1) Section 701 proceedings are clearly rule making; (2) there is nothing wrong in government counsel assisting in preparing portions of the findings and conclusions; (3) Section 8 of the APA does not require that there be an "initial decision" prepared by a hearing examiner; (4) the Administrator, who is charged with making the actual decision, can rely on the assistance and expertise of his subordinates.

It may well be that with the new statutory language of Section

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[17] § 408(d), 21 C.F.R. 120.27; § 701(e), 21 C.F.R. 1.712; § 409(b), 21 C.F.R. 121.70.

701(e) and with the change in the statutory scheme to more "licensing-like" activities, all of the holdings of the *Willapoint* case are no longer entirely reliable authority.

Another problem of the 701(e) hearing is the determination of who has the burden of proof. It will be recalled that at the time of the 701(e) hearing, the Commissioner has already proposed the adoption, amendment or repeal of a particular regulation. He has presumably relied upon the substantive section of the Act which have certain statutory standards for the promulgation of rules.

Section 401 (341), for example, dealing with food standards, states that "whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations" fixing food standards. Under Section 406 (346), dealing with the establishment of tolerances for poisonous ingredients in food, the Secretary shall promulgate regulations limiting the amount of poisonous substances to the extent "he finds necessary for the protection of the public health" and only when such substance is required in production or cannot be avoided in good manufacturing practice. Under Section 706(b) (376(b)), the Secretary shall by regulation provide for the listing of color additives for use in or on food, drugs or cosmetics "if and to the extent that such additives are suitable and safe for any such use when employed in accordance with such regulations."

These general standards are the tests by which the Secretary determines whether or not to adopt finally a particular regulation despite the objections of the parties seeking the hearing. As a basic matter, it would seem clear that the burden of proof to support the regulation proposed to be adopted would fall upon the proponent of the rule—perhaps the original petitioner if his proposal was accepted, or the FDA, itself, if it proposed the regulation or the changes adopted. The objectors, of course, are dissatisfied with the proposed regulations, either because the regulation should not have been adopted at all, i.e., there was no need for it, or because the actual proposal should have been changed or amended. Yet, in practice, unless the objectors go forward with their evidence as to why the regulation is improper, there will be no record upon which to determine the validity of the objections and the regulation will stand.

This shifting of the burden to the objectors can constitute a most serious problem. Perhaps an appropriate procedure in these hearings would be to require in cases where the agency's staff has itself helped to develop the testing and studies leading to the formulation of the proposed rule, that the government witnesses appear and testify in support of the proposed regulation. This would help complete the record. But perhaps, more important, it would help to alleviate some of the difficulties of the institutional decision.

We have already touched upon the difficulties facing the objectors when the FDA has failed under Section 701(e)(1) to propose a rule at all, *supra,* pp. 12-13; the negative burden of proof is almost insurmountable.

These, in summary, are a number of the hearing problems under Section 701. The procedure, it is submitted, though basically fair for general rule making proceedings of broad scope, breaks down under the heavy work load of ever-increasing substantive grants of authority. Failure to act at all, delays, diffused and ambiguous authority and apparent arbitrariness can be the result.

F. *Miscellaneous Rule Making Procedures*

A substantial amount of rule making activity in the FDA has no specific procedures set forth in the Act. Accordingly, there is only the most informal and limited type of rule making participation permitted. Typical examples include the general statements of policy or interpretive rules. The FDA may hold informal conferences with the public or interested parties and may even invite written comments after notice in the Federal Register. But then again, the agency may afford none of these types of participation. The courts have generally held that interpretive rulings require no hearing, evidence or findings.[18] The basis given is the fact that the interpretation given is simply the agency's understanding of the law and can easily be reviewed in court when an actual controversy arises.

Without extended comment on the risks of this "gun to the head approach" where as here criminal sanctions are available to the FDA, it is obvious that many statutory interpretations could benefit from the accumulated insight and experience of the public. Thus, public comments, even if not absolutely required, would normally serve a useful purpose and could in many cases, prevent agency arbitrariness.

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[18] United States v. 353 Cases . . . Mountain Valley Mineral Water, 247 F.2d 473 (8th Cir. 1957). See also § 4 of the APA.

Beyond these general policy regulations, there are a myriad of other grants of express rule making authority. Express regulations authorized by the Act for which there is no stated procedure include the following. Section 403(e) (343(e)), requires a food in package form contain, among other things, an accurate statement of the quantity of the contents; provided the Secretary shall permit reasonable variations, however, and "exemptions as to small packages shall be established by regulations." Section 403(i) (343(i)) requires that the food label bear the common or usual name of the food, if any, and if made from two or more ingredients, the names of each ingredient. If compliance with Section 403(i)(2) (343(i)(2)) is impracticable or results in deception, or unfair competition, exemptions shall be established by regulations. Section 403(k) (343(k)) requires labeling if the food contains any artificial flavoring, coloring or chemical preservative. There is a proviso that if the requirements of this paragraph are impracticable "exemptions shall be established by regulations."

Section 405 (345) authorizes the Secretary to promulgate regulations exempting from any labeling requirements (1) "small open containers of fresh fruits and fresh vegetables" and (2) food which is, in accordance with the practice of the trade, "to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed."

Section 502(b) (352(b)) requires that a drug will be deemed misbranded if in package form unless it bears a label with certain information on it, with the proviso that reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations. Section 502(e) (352(e)) requires that a drug have a label giving the common name of the drug or its ingredients. There is again a proviso that if the compliance with these requirements is impracticable, exemptions shall be established by regulations. Section 502(f) (352(f)) requires that a drug have labeling bearing adequate directions for use and warnings against uses which may be dangerous to health. The labeling as to directions for use can be eliminated where not necessary for the protection of the public health, upon regulations of the Secretary exempting the particular drug.[19]

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[19] Interestingly enough § 502(d) (352(d)) and 502(h) (352(h)) are expressly covered by § 701, though §§ 502(b)(e) and (f) are not. The reason for the difference in procedure is apparently based on the importance of the regulatory activity.

Section 503 (353) expressly provides for the promulgation of regulations exempting from labeling or packaging requirements drugs and devices which are to be processed, labeled or repacked in substantial quantities in establishments other than those where originally processed or packed. Section 505(i) (355(i)) dealing with new drugs provides that the Secretary may promulgate regulations for exempting from the operation of that section "drugs intended solely for investigational use by experts."

Part of the rule making activities of Section 506 (356) and 507 (357) have no specific procedure set forth. Section 602(b)(2) (362 (b)(2)) provides that a cosmetic in package form is misbranded unless its label contains an accurate statement of quantity. However, there is the proviso that reasonable variations will be permitted and exemptions as to small packages may be established by regulation. Section 603 (363) authorizes the Secretary to promulgate regulations exempting from labeling requirements of the Act, cosmetics which are to be processed, labeled or repacked in substantial quantities at establishments other than those where originally processed or packed.

None of these provisions have any specified procedure. There appears to be little reason or logic why such significant lack of procedures are permitted under the Act. Section 4 of the APA defining the rule making responsibilities of agencies generally is certainly applicable. Notice of the proposed rule making published in the Federal Register, an opportunity to participate through submission of written data, views or arguments (without necessarily the right to oral argument), a consideration of relevant material presented and "a concise general statement" of the basis and purpose of the rules actually adopted is clearly required under Section 4.

It appears that the Secretary does not always comply with these general requirements. The need, of course, for informality, private conferences and speed is obvious. Apparently many industrial representatives and members of the bar prefer the totally informal ad hoc procedures presently in vogue at the agency in these areas where specific procedures are not provided. And this is fine so long as the results are satisfactory to the informal participants. What happens, though, when the FDA acts in an arbitrary or illegal fashion? What relief is there when there has been no established procedure?

Suppose, for example, under Section 403(i) a particular food processor seeks an exemption from the requirement that the label of the food bear the names of each of the ingredients on the grounds that to require the labeling will result in "deception or unfair competition." Under present procedure, he would informally request an exemption and confer informally with the staff. The Secretary might refuse to act at all or he might deny the request in a generalized, uninformative letter of denial. Similarly Section 502(f) provides that a drug or device should be deemed misbranded unless its labeling bears adequate directions for use. If the labeling isn't necessary for the protection of the public health, the Secretary can, by regulation exempt such drug or device. Under present procedure, upon a request for exemption, the Secretary can simply refuse to act on the request or could deny it by a simple letter of denial. Furthermore, under neither of these examples would the public necessarily know the exemption proceedings were even pending.

Thus, even in these informal rule making proceedings for which the Act sets no procedures, some re-examination is in order. Probably a public notice of the request for rule making should be required. Further, if the FDA refuses to grant the request, there should be a reasonably complete order explaining why. This would permit judicial review of at least basic questions of interpretation and policy.

III. Miscellaneous Problems of Procedure

A. *The Food Additive Act and the Delaney Clause*

The Food Additives Act of 1958 has raised several procedural problems of consequence. Delay has been one of the most troublesome, but with the passage of time and with experience, some progress should be made on this score.

One particularly troublesome section has been the so-called Delaney Clause, Section 409(c)(3)(A) (348(c)(3)(A)).[20] This provides that no food additive shall be deemed safe:

> "If it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety or the product, to induce cancer in man or animal."

The 1958 law also included a grandfather clause which exempted from the term "food additive," "any substance used in accordance with a sanction or approval granted prior to the enactment" of the 1958 Act. (Section 201(s)(4)).

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[20] The same clause, though in somewhat better form, has been added to the Color Additives Act of 1960, § 706(b)(5)(B)(C).

At first reading, this would not seem so severe a sanction, particularly in light of the obvious seriousness of cancer. However, as administratively interpreted, this section has been construed to require an absolute prohibition of the use of a substance likely to induce cancer under any circumstances, no matter how unrealistic or unrelated to the substance and use contemplated.

It is true that there is some support for the claim that if the substance can induce cancer under *any* circumstances, it can be administratively banned under *all* circumstances no matter how safe; this authority is sometimes necessary because the state of the art won't permit the establishment of a safe level of use.[21] This, however, is an extreme position, and one not properly the situation in the case of the Delaney Amendment.

Really, two basic questions are involved: (1) Is the substance carcinogenic? (2) Can a safe threshold tolerance or dosage be determined even for an established carcinogen? The Administrator has interpreted the Delaney Clause as forbidding the establishment of a tolerance under this second question, though the weight of scientific opinion is that in many cases a safe dosage is possible, and even under the first question, he has prevented the use of substances only suspected of being carcinogenic.

Another surprising interpretation of the FDA is that a feed additive which is likely to induce cancer in some animals thereby makes the meat of all animals which have been given the food additive unfit for human consumption, even though there is no evidence that the particular animal will be adversely affected or that the meat when consumed by humans is likely to induce cancer. This has occurred in connection with the use of diethylstillbestrol (DES) in animal feed. DES is a known carcinogen; however, it has been estimated that it is used in beef feed supplements in about 75% of all beef cattle feeding. The use of this drug in animal feed, primarily beef and for poultry, had long been approved and at the time of the adoption of the Delaney Clause in 1958, there were outstanding hundreds of new drug applications expressly authorizing the use of DES as a feed supplement. Thus, the "grandfather" clause of Section 201(s) applied.

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[21] Cf. Flemming v. Florida Citrus Exchange, 358 U.S. 153 (1958), where the Court held the secretary properly revoked the certification of a particular coal tar color, even though no evidence that level of ingestion in human consumption was harmful. The Court very carefully relied upon the particular language and history of § 406 (346) to support the decision.

However, in a general policy statement on veterinary drugs issued May 30, 1959 (Section 3.37 of 21 C.F.R., 24 F.R. 4376) without benefit of any full rule making procedures, the FDA rules that no further new drug applications would be granted for the use of DES in animal feed, and that prior sanctions already in existence for the use of this drug, would be continued, though they could not be amended or supplemented.

In connection with poultry, recent tests indicated the presence of a harmful residue in the edible portions of the treated poultry, and administrative action has been taken to revoke existing new drug applications granted many firms. But in connection with beef cattle, the evidence shows that DES is not harmful to cattle and no residues remain in the edible portion of the beef. Yet the FDA will issue no new or supplemental drug applications.

This has created the anomalous and unwarranted situation that one manufacturer who received authority to use DES prior to 1958 can continue to use it as a feed supplement, whereas his competitor next door cannot. Obviously, this has nothing to do with safety. All that it means is that the cattle growers will use the competitor who has the existing authorization.

This is an entirely too narrow an administrative interpretation of Section 201(s)(4), the grandfather provision. Congress was exempting from the requirements of a food additive regulation a "substance" "used in accordance with a prior approval." It was the use of the drug, not the manufacturer, which had the sanction.

Even the Secretary, recognizing the unfairness of his position, had suggested to Congress in connection with the Color Additives Amendment (and has since proposed it for other legislation) [22] that the provisions of the Delaney Clause should be amended so as not to apply to drugs used in animal feeds, where it can be shown that the drug would do no harm to the animal, and where under prescribed conditions of use, no residue of the carcinogen remains in the edible tissue of the treated animal. In other words, the Secretary was willing to exempt, by statute, the use of the carcinogenic chemicals where it could be established that they would be safe for human consumption where used in animal feeds. Yet he was not willing to do this by administrative interpretation. This, it is believed, is clearly a mistake. His willingness to accomplish this by statute only heightens the arbitrariness of the agency's intransigence.

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[22] H.R. 11582, 87th Cong., 2d Sess., introduced May 3, 1962. § 302.

B. *Excessive Publicity of Proposed Agency Actions*

A difficult problem in the administration of the Act has to do with the question of publicity, and the part agency publicity regarding pending cases or investigation properly plays in the overall regulatory activity. The determination of whether a particular food or drug was detrimental to the health of the nation should normally be determined in the hearing room after a full and fair hearing. But the Secretary, by the issuance of a series of press releases and news stories condemning the food or drug, can effectively destroy the marketability of a product without the need of a hearing at all. Trial by press release can be most unfair and improper.

Section 705 (375) of the Act authorizes the Secretary to disseminate information regarding food, drugs and cosmetics "in situations involving, in the opinion of the Secretary, imminent danger to health, or gross deception of the consumer." It seems clear that Congress intended to set a standard for the Secretary to apply in determining whether to call a press conference. Obviously if there is, in the language of the statute "an imminent danger to health" the Secretary has to be able to move quickly. Evidence to date indicated, however, that this discretion has been abused.

Press releases have been used in the food field, regarding the efficacy and health value of a variety of vitamins, minerals, food supplements and other "natural" food promotions. The issue in these cases is clearly not whether there is an imminent danger to health, but whether the public is being deceived by claims that certain vitamins, minerals or food supplements have greater therapeutic values than in fact they have. Here, excessive publicity is certainly not required. The mere announcement of formal administrative action should suffice.

It should be noted that the Bar Association's Administrative Procedure bill, which has been introduced in the second session of the 87th Congress, as H.R. 9926 (also S. 1887), expressly deals with this subject; the bill proposes that agency publicity which was intended to discredit or disparage a person under investigation, or a party to an agency proceeding, may be held to be a prejudicial prejudging of the issues, and the reviewing court may set aside the agency action. We would strongly support this bill. But beyond this, we suggest that perhaps Section 705 should, itself, be amended to make clear that except for emergency situations, legitimate publicity on specific cases extends only to the issuance of notices of hearings, decisions in hearing cases and issuances of rule making or policy statements.

C. *The Section 305 Hearing*

Section 305 (335) requires that before any violation of the Act is reported to a United States Attorney for criminal prosecution, the defendant shall be given "appropriate notice and an opportunity to present his views." However, this "hearing" is not a prerequisite to prosecution.[23] The FDA affords this type of hearing only when it wishes to do so, and apparently the industry has not seen fit to question this unlimited discretion. However, complaints have been registered against the use by the FDA of a 305 proceeding to scare a manufacturer into compliance with an agency borderline ruling regarding labeling, packaging, or other similar restrictions—a situation where the agency is not sure its position is entirely sound. Clearly the use of Section 305 should be invoked only where there is a serious violation of law and actual intent to prosecute, rather than to situations where no serious violation is involved and the FDA is using the 305 technique to secure compliance with an unusually strict interpretation.

CONCLUSIONS

The various procedural questions discussed above are not intended to be all-inclusive, nor are the suggestions for change or improvement necessarily the correct answers. Like Topsy, many of the procedural techniques just "grew"—and "grew" without relation to other sections of the Act and their procedures. In light of the increasing complexity of the agency's functions, and in light of the continuing shift of responsibility to securing prior approval before manufacturing or marketing a product, a re-examination and probable overhaul of the procedures are in order. Certainly this Committee is convinced that present procedures do not reflect the high standard of fair and expeditious treatment to which persons dealing with the agency are entitled.

BEN C. FISHER, *Chairman*
Committee on Food and Drugs

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[23] United States v. Dotterweich, 320 U.S. 277 (1943), rehearing denied, 320 U.S. 815.

PROPOSALS FOR REVISING DEPARTMENT OF AGRICULTURE PROCEDURES

The chief effort of the special committee on agriculture, this year, has been to do the spadework for what we hope will produce an effective review and revision of the administrative procedures of the major regulatory programs within the Department of Agriculture.

At the outset a working executive committee was organized, as authorized by the Council, consisting of Charles W. Bucy, Ben Ivan Melnicoff, Jesse E. Baskette, Donald A. Campbell and the chairman of the special committee. Following the suggestion of the Chairman of the Section, this committee decided to concern itself with the regulatory activities of the Department of Agriculture which involve administrative hearing proceedings. The bulk of such proceedings arise under the Commodity Exchange Act, the Packers and Stockyards Act, the Agricultural Marketing Agreement Act of 1937, the Perishable Agricultural Commodities Act and the Agricultural Adjustment Act of 1938.

The executive committee thought that a constructive approach towards its objective of improving the administrative procedures under the above-named regulatory programs would be to interest the Department of Agriculture in undertaking a revision, with our committee acting in a consultative, although independent, capacity.

With this in mind exploratory discussions were had with department officials. These efforts succeeded in germinating what may bring fruitful results. On May 4, 1962, the Secretary of Agriculture, following a conference between our executive committee and the general counsel of the department, issued a memorandum to the heads of the department agencies calling upon them to "review the procedures and practices under our regulatory and service programs." Such review, he said, is to be coordinated by the General Counsel, who, in turn, is instructed to "provide for effective liaison" with our special committee. The full text of the memorandum is annexed to this report. (Appendix A)

Since the members of the special committee represent most segments of the agriculture industry, the contemplated exchange of views with the Department of Agriculture on a subject with which we are deeply concerned could be most useful.

In line with this effort, the executive committee has noted, with regret, the almost total lack of understanding among knowledgeable people in the administrative-regulatory field of the wide scope and economic significance of the regulatory activities of the Department of Agriculture. This is an example of the parochialism that exists among students and practitioners in the regulatory law field. Most of us are so deeply involved with our exacting work in particular, specialized fields, such as railroad transportation, securities or communication, etc., that we ignore significant developments in other regulatory areas. Sometimes general references are made to the "Big Six" independent agencies, and such common procedures and practices as are devised are largely based on their experience. Even Dean Landis, in his December, 1960 report to the President-elect on the regulatory agencies, confined himself to the same group of agencies.

In overlooking a great agency, like the Department of Agriculture, as well as others, a serious mistake is made. The one viable proposal that grew out of the Landis Report and President Kennedy's reorganization plans, and which is now consuming much of the time and energies of the Administrative Conference of the United States, has long been used successfully in the Department of Agriculture. This is the proposal to delegate final adjudicative powers to others than the agency heads. The Judicial Officer of the Department of Agriculture has performed such a function since 1941. Yet few, if any, of the important people in this field seem to be aware of this.

Furthermore, the Department of Agriculture has for a long time actually been dealing with the problem of "coordinating" a wide variety of regulatory programs which have a common basis. Such a program as regards the fields of transportation, energy and communication was proposed by the Landis Report without any reference to the extensive experience in agriculture. This failure assuredly contributed to the total disregard of the proposal.

In view of these things, we have prepared and annexed to this report a brief summary of the major regulatory activities of the Department of Agriculture. (Appendix B) It is our hope that this information will reach some of the people who might want to have it at hand. Also, it describes the regulatory programs whose procedures and practices will undoubtedly be reviewed by the Department of Agriculture with the assistance of this committee pursuant to the Secretary's memorandum. In addition to the annexed summary, attention is called to the excellent series of articles appearing in the January, 1958 issue of the George Washington Law Review, vol. 26, No. 2, and entitled *"Symposium on the Regulatory Functions of the Department of Agriculture,"* and also to Coffman, *Federal Aid in the Development of Agriculture,* 21 Fed. Bar Journal 399 (1961).

Note should also be taken of the action by this committee on a special question put before it by the Policy Planning Committee of the Section. This involved the status of the Judicial Officer of the Department of Agriculture, who, as has been indicated, has final adjudicative authority in lieu of the Secretary of Agriculture, in proceedings where there is a statutory requirement for a record to be based on an administrative hearing. Our special committee fully supported, and urged implementation of, a policy resolution adopted by the American Bar Association in 1957 which provided that the compensation of the Judicial Officer should be at a rate equivalent to that of an Assistant Secretary of the Department.

For the future there is obviously much for this special committee to do. Once under way, the job of assisting in the revision of the procedures and practices of the Department of Agriculture could become a major, time-consuming activity. Also, as is well-known, important substantive aspects of the farm program are now being studied by the Administration and the Congress. These will undoubtedly involve procedural changes affecting regulatory activities of concern to this committee.

MILTON M. CARROW, *Chairman*
Agriculture Committee

APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

May 4, 1962

MEMORANDUM TO HEADS OF DEPARTMENT AGENCIES

Administrative Procedures and Practices

Various studies have been made during the last few years and studies are presently being made with respect to administrative procedures and practices under numerous Federal regulatory programs. Our Department administers more than fifty regulatory programs and it is recognized that these programs vitally affect important segments of our Nation.

The improvement of procedures and practices of the Department has been and should be a matter of concern to us all. I believe that it is appropriate to review the procedures and practices under our regulatory and service programs on a continuing basis, bearing in mind our purpose to promote the public interest promptly and efficiently, while insuring the protection of the rights of the members of the public affected under simple, effective, and readily understandable procedures.

The primary responsibility for administering the programs of the Department has been vested in different agencies, but, in view of the desirability of a uniform approach in determining any needed changes in the procedures and practices involved, I am requesting the General Counsel to coordinate the Department's activities in this respect, and to assume responsibility for initiating steps to effect any improvements recommended in the procedures and practices under the Department's regulatory and service programs. Agency heads are requested to cooperate with the General Counsel in this regard.

The Executive Committee of the Special Committee on Agriculture of the Administrative Law Section of the American Bar Association has recently conferred with the General Counsel with respect to the Department's procedures and practices and has offered the cooperation and assistance of the Committee in connection with any proposed changes in our procedures and practices. The cooperation and assistance of this Committee is welcomed by the Department in order that we may have the benefit of its views in this respect. I am sending a copy of this memorandum to the Chairman of the Committee, and the General Counsel will provide for effective liaison with the Committee.

Orville Freeman, *Secretary*

APPENDIX B

MAJOR REGULATORY PROGRAMS OF THE DEPARTMENT OF AGRICULTURE

The Department of Agriculture is one of the major Federal regulatory agencies. Its 70,000 employees, at several thousand locations, administer more than 50 regulatory programs relating to the production, marketing, and handling of agricultural commodities and their products. Agriculture is the largest of our Nation's industries, with total farm assets of approximately $203 billion and an annual farm income of about $39 billion.

The Department's regulatory programs are strikingly similar to the regulatory programs administered by a number of other Federal agencies. For example, the Department regulates activities relating to commodity futures on Exchanges, such as the Chicago Board of Trade, in much the same manner as the Securities and Exchange Commission regulates activities relating to the stock market. The Department regulates unfair or monopolistic practices of packers and other aspects of the livestock industry in a manner similar to the regulation of other industries by the Federal Trade Commission. The Department has jurisdiction with respect to rates under the Packers and Stockyards Act similar to the jurisdiction of the Federal Power Commission and the Interstate Commerce Commission as to other rates. The activities of the Department relating to meat inspection and poultry inspection are consonant with similar activities, as to other commodities, of the Food and Drug Administration of the Department of Health, Education and Welfare. The Department also participates in proceedings relating to the transportation of agricultural commodities and products before the Interstate Commerce Commission and other Federal and State transportation agencies.

In recent years, the view has been gaining momentum that agencies should delegate the authority to issue many final decisions so that the agencies do not have to decide all of the cases which come before them. The practice of delegating the authority to issue final decisions has been followed in the Department of Agriculture since 1941, when an Assistant to the Secretary was delegated authority, pursuant to the Act of April 4, 1940 (5 U.S.C. § 516a *et seq.*), to decide adjudicatory proceedings under the Department's regulatory statutes. In 1945 the title of the position was changed to Judicial Officer. The present Judicial Officer, Mr. Thomas J. Flavin, has served in that position since 1942. The Judicial Officer acts as the final deciding officer, in lieu of the Secretary, in the Department's administrative proceedings involving adjudication or rate-making where there is a statutory requirement for action to be based upon the record of an administrative hearing. The Judicial Officer functions principally in connection with proceedings arising under the Commodity Exchange Act, the Packers and Stockyards Act, the Agricultural Marketing Agreement Act of 1937, and the Perishable Agricultural Commodities Act.

The regulatory programs administered by the Department under which the major volume of formal administrative proceedings arise are outlined in the following paragraphs. In addition to programs involving administrative proceedings subject to section five of the Administrative Procedure Act, the Department administers a number of programs involving administrative proceedings not subject to the formal procedures of this section.

Under the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*), the Secretary regulates brokerage firms, brokers, and other persons who engage in futures trading on Exchanges designated as contract markets (such as the Chicago Board of Trade). The disciplinary proceedings under the Act relate to varied forms of violations, such as manipulating prices, irregular trading practices, cheating or defrauding customers, exceeding speculative trading limits, and failing to file required reports. The Judicial Officer may suspend, for a period of six months, or revoke, the registration of a brokerage firm or floor broker for violating the Act or the regulations promulgated thereunder, and the Judicial Officer may prevent any person who violates the Act or the regulations, whether or not registered with the Secretary, from engaging in futures trading on Exchanges.

The Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) provides for the regulation, in various respects, of the activities of packers, stockyard owners, market agencies (such as commission firms buying and selling livestock at stockyards) livestock dealers, and live poultry dealers and handlers. As to packers, the Act proscribes certain practices, such as engaging in or using unfair, unjustly discriminatory, or deceptive practices or devices, making or giving undue or unreasonable preferences or advantages to any person or locality, and engaging in any course of business for the purpose or with the effect of manipulating or controlling prices or creating a monopoly. The Judicial Officer ordered a packer to cease and desist from engaging in such practices. With respect to market agencies and livestock dealers, the Act imposes obligations as to registration and solvency. All rates and charges for stockyard services must be just and reasonable. The Act declares various practices to be unlawful, such as engaging in unfair, unjustly discriminatory, or deceptive practices in connection with the handling of livestock. The Judicial Officer may issue cease and desist orders applicable to stockyard owners, market agencies, and livestock dealers, and the Judicial Officer may suspend the registration of market agencies and livestock dealers for a reasonable specified period. The Judicial Officer may award reparations if he determines that any stockyard owner, market agency, or dealer has violated the Act or an order of the Secretary thereunder. Many of the provisions of the Act applicable to stockyard owners, market agencies, and livestock dealers are also applicable to live poultry dealers and handlers.

The Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*) provides for the issuance of marketing agreements and orders, applicable to handlers, with respect to numerous agricultural commodities and products thereof. Marketing orders regulating the handling of milk establish uniform minimum prices which handlers must pay to producers for their milk. Marketing orders relating to the handling of other agricultural commodities and products provide for restrictions as to the grade, size, or quality of the commodity or product which may be handled, and as to the quantity of certain commodities or products which may be handled during prescribed time periods. Any handler may obtain an administrative adjudication by the Judicial Officer as to whether any marketing order or provision thereof or obligation imposed in connection therewith is not accordance with law.

The Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) was enacted to suppress unfair and fraudulent practices in the marketing, in interstate or foreign commerce, of fresh fruits and fresh vegetables. Every commission merchant, dealer, or broker who engages in the business of marketing perishable agricultural commodities is required to be licensed, and a penalty is imposed for operating without a license. The Act specifies conduct of licenses which is unlawful and the Act, *e.g.*, rejecting or failing to deliver in accordance with the terms of a contract without reasonable cause any perishable agricultural commodity; or failing to account truly and correctly and make full payment promptly. The Judicial Officer may suspend for a period of time not to exceed 90 days, or revoke, the license of a person who engages in specified unlawful activities. Several hundred reparation proceedings are handled each year under the Act, and if a later judicial proceeding is held with respect to the matter, the findings of the Secretary are prima facie evidence as to the facts.

Under the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1281 *et seq.*), the Secretary establishes acreage allotments and marketing quotas applicable to wheat, tobacco, cotton, peanuts, and rice. Marketing penalties must be paid by persons who produce for market excess amounts of such commodities. If any farmer is not satisfied with the farm marketing quota, farm acreage allotment, or other administrative determination with respect to his farm, he may obtain a review before a local review committee consisting of three farmers. This review committee issues the final agency decision with respect to the matter, and an appeal may be taken to an appropriate Federal or State court.

PROCEDURES OF THE BUREAU OF FEDERAL CREDIT UNIONS AND OF THE SOCIAL SECURITY ADMINISTRATION OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

The Committee has been engaged in the study of the administrative practices and procedures of the bureaus within its jurisdiction, which include all of the bureaus of the Health, Education and Welfare Department, except the Food and Drug Administration. Two bureaus were studied and a third is under study.

Bureau of Federal Credit Unions

Mr. Wendell R. Jones, Salt Lake City, Utah, a committee member, made a comprehensive review of the statutory provisions bearing on the procedures of the Bureau of Federal Credit Unions. The Bureau administers the Federal Credit Union Act, and performs many functions, including:

Approval of organizational certificates
Approval of bylaws
Prescribing examination fees
Ruling on the establishment and use of regular and special reserves
Acting on requests to merge or convert
Suspending or revoking of charters
Placing credit unions in involuntary liquidation
Approval of surety bonds
Rulemaking regarding credit union operations, such as regulations relating to discounting of obligations

Mr. Jones reviewed the Federal Credit Union Act and determined that as to adjudications by the Bureau there is no statutory requirement for notice or hearing except as provided in Section 4 of the Administrative Procedure Act; that there is no provision for subsequent trial *de novo;* that there is no provision for the right of appeal from denials of requests; that there is no clear separation of the functions of adjudication and investigation; that there are no statutory formal proceedings with respect to adjudication nor any requirement that adjudications be determined on the record after opportunity for hearing. In like manner, as to rulemaking there is no provision for notice or hearing except as provided by Section 4 of the Administrative Procedure Act; there is no formal standard for stating the reasons for rules adopted; there is no statutory provision for trial *de novo* nor is there a statutory provision for the right of appeal. Mr. Jones concludes that a further study is necessary and desirable to determine whether the procedures presently followed by the Bureau are adequate for the administration of its program, fair to those whom they affect and in the best public interest.

Mr. Jones submitted his report for comments to Attorney David R. Weinberg, Director of the Legal and Legislative Department of the Credit Union National Association. Mr. Weinberg stated that H.R. 3674, a bill to recodify the Federal Credit Union Act introduced in January 1959 by Congressman Multer of New York, would have placed the Director of the Bureau more directly within the Administrative Procedure Act. This would have been accomplished through an addition requiring that in every case of adjudication determination be made on the record after opportunity for hearing.

Social Security Administration

Mr. Hugh Roff, St. Louis, Missouri, a committee member, made a study of procedures of the Social Security Administration particularly applicable to its administration of the Social Security Disability Insurance Program.

Congress has evidenced a continuing interest in the procedures followed by all of the bureaus within the Health, Education and Welfare Department and particularly those of the Social Security Administration. In November of 1956 the Committee on Government Operations (Dawson Committee) of the House of Representatives submitted a questionnaire to the Department requesting information concerning the powers and practices of the various bureaus with regard to rulemaking, adjudication, separation of functions, inspection of records, workload and staffing patterns, uniformity of administrative procedure, rules for admission to practice and for avoidance of conflicts of interest and exemption from the Administrative Procedure Act. Replies to this questionnaire were submitted by the agencies within the Department throughout 1957. This questionnaire, and the replies thereto, were collected in a pamphlet entitled "Survey and Study of Administrative Organization, Procedure and Practice in the Federal Agencies by the Committee on Government Operations, Agency Response to Questionnaire, Department of Health, Education and

Welfare," which is available from the Government Printing Office.

Thereafter, in 1960 the Subcommittee on Administration of Social Security Laws (Harrison Subcommittee) of the House Ways and Means Committee submitted a preliminary report on the administration of the Social Security disability insurance program which is also available from the Government Printing Office.

These reports were reviewed. The problems involved in Social Security procedures can be organized in accordance with the different levels at which claims are considered as follows:

1. Consideration at the district office.
2. Hearings before Examiners.
3. Review by the Appeals Council.
4. Judicial review.

1. *Consideration At The District Office*

A procedural problem arises in connection with the consideration at the district office when a disability claim is denied. In such event the claimant receives a so-called "denial letter." This is a form letter which gives few, if any, particulars of the reasons for the denial. The claimant only gets an invitation in the last paragraph of the letter:

> "If you have any questions, please call at the district office shown above and take this notice with you."

Receipt of the "denial letter" is a crucial point for the claimant since he must then decide whether to drop the matter or whether to seek a hearing. A strong argument could be made that for the protection of the claimant's rights he should be informed of the medical-legal reason underlying the denial of his claim. This would permit the claimant to intelligently evaluate his claim and would also specify for him where his evidence did not meet the requirements of the act.

2. *Hearings Before Examiners*

A claimant who is dissatisfied with the initial decision in his case may, after request for reconsideration, request a hearing before a Hearing Examiner appointed under the provisions of the Administrative Procedure Act. Two problems with respect to these hearings which require consideration are: (a) representation for claimants at hearings; and (b) consideration by the Examiner of materials not available to the claimant.

a. *Representation for claimants at the hearings*

In the typical case the Hearing Examiner must exercise three functions—that of adjudicator, investigator, and protector of the claimant's rights. One question which arises concerning this practice is whether the Examiner, as a practical matter, can adequately perform all three functions at once. A question also arises as to the legality of this combination of functions in view of the requirements of Section 5(c) of the Administrative Procedure Act providing for the separation of functions.

The burden placed on the Examiner of deciding claims without assistance results from the fact that the claimant is usually not represented by counsel. Low fees for counsel are fixed by regulation. A recent regulation has increased the fee from $10 to $30 for the Hearing and Appeals Council. Previously under special circumstances higher fees could be allowed on petition and presumably this still applies. Nevertheless, the fee schedule is still very low. And as Mr. Earl W. Kintner testified to the Harrison Subcomittee while representing the Administrative Law Section, a lawyer's services are worth what they are paid for.

Consideration should be given to urging the Social Security Administration to adopt a more realistic fee schedule.

b. *Consideration by Examiner of materials not available to the claimant*

A considerable quantity of guidance material is available to the Hearing Examiner which is not available to the claimant or his representative. These include a confidential State Manual dealing with disability standards, memoranda from the Office of Hearings and Appeals, General Counsel's opinions, and decisions of the Appeals Council. It would appear that in order to meet even minimum standards for the hearings to proceed in a judicial manner, all precedence material should be published or should at least be equally available to the claimant as to the Examiner. Further, a strong doubt exists that the published regulations adequately define the standards to be applied in administering the act.

The guidance material furnished Examiners not only has the undesirable effect of giving the claimant the disadvantage of being in the dark as to standards to be applied in his case, but also has an objectionable feature of impairing the independence of judgment of the Examiner. The guidance in the past has even extended to the point of supervisory personnel sitting in on cases.

The Harrison Subcommittee report states that there have even been instances of requests from the Office of Hearings and Appeals that Examiners submit their next four disability decisions for consideration and comment before release. All of these forms of "guidance" reflect on the independence of the Hearing Examiner.

Another doubtful practice in hearings is the use by the Examiners of so-called "medical consultants" who are under contract with the Office of Hearings and Appeals. The Examiner may seek medical advice from these consultants and the opinions of the consultants are not a matter of record. The opinion of the Harrison Subcommittee that medical consultants should be used in only two ways appears to be well founded. The Subcommittee recommends that such consultants should either be used in general training sessions involving general questions and a group of Examiners or as witnesses whose testimony appears in the record if the claimant so requests.

3. *Review by the Appeals Council*

If a claim is denied by the Hearing Examiner, the claimants may seek review by the Appeals Council which may or may not decide to review. If a claim is allowed by the Examiner, the Appeals Council may assert jurisdiction and review the Examiner's decision on its own motion.

Under existing regulations the Appeals Council may accept new evidence whether for or against the claimant. This raises a question as to the lawfulness of the Appeals Council review under Section 7(a) of the Administrative Procedure Act, since members of the Appeals Council are not "examiners appointed as provided" under the Administrative Procedure Act. Apart from this consideration, it could be argued that it is exhausting to the claimant to have to try his case *de novo* before the Appeals Council. A strong contention could be made that it would be desirable for the basic hearing functions to be carried out by the Examiner and for the Appeals Council to be limited to a review function.

Another question which arises concerns the actions of the Bureau in appeals to the Appeals Council. When a Hearing Examiner has allowed a claim and has thereby reversed a Bureau denial, the decision is studied by a special Bureau unit. The Bureau then sometimes asks the Appeals Council to review the case on its own motion. The fact that the Bureau has "appealed" is not noted in the record and neither are the grounds and contentions of the Bureau made available to the claimant.

It could be argued that the Bureau in seeking to have the Appeals Council reverse an allowance by the Examiner in this manner is "participating in the decision" in violation of Section 5(c) of the Administrative Procedure Act. In any event it seems undesirable for the Bureau to attack the Examiner's award without the claimant being informed of the grounds for complaint.

4. *Judicial Review*

When a claimant has exhausted all of his administrative remedies he may seek a judicial review in a Federal District Court. Two limits on the power of the court should be considered. Under Section 205(g) of the Social Security Act, (1) the court must remand the case for administrative proceedings if the Secretary so requests before filing his answer, and (2) the court is bound by administrative findings of fact which are supported by substantial evidence.

It is doubtful whether the right of the Secretary to require remand of the case is fair to the claimant. It further lengthens the proceeding, thus further exhausting the claimant. And the administrative agency may use remand only to bolster up a record which it may feel is insufficient to sustain judicial scrutiny. It would seem desirable that the Section give consideration to recommending to Congress that the Act be amended to make remand on request of the Secretary discretionary with the court. This would be in accord with the recommendation made by the Harrison Subcommittee.

Mr. Roff concludes that comments be sought with respect to these possible procedural deficiencies from the Social Security Administration and then appropriate recommendations be made to the Administration and for further legislation.

WAYNE E. BABLER, *Chairman*
Committee on Health, Education
and Welfare

ANALYSIS OF THE DEPARTMENT OF STATE'S POSITION REGARDING THE FOREIGN AFFAIRS EXEMPTION FROM THE ADMINISTRATIVE PROCEDURE ACT

In November of 1956 the House Government Operations Committee, under the chairmanship of Representative William L. Dawson, undertook a comprehensive survey and study of the administrative organization, procedure and practice in the Federal agencies. The Committee requested from Government agencies and departments answers to an extensive questionnaire, now popularly referred to as the Dawson Questionnaire, in order ". . . to gather information on present Government procedures especially as they affect the public by whom and for whom our Government has been established."[1] The questionnaire itself contained nine major categories of questions. During the year 1957 the Department of State submitted responses to that questionnaire, Part VIII of which covered "Exemptions from the Administrative Procedure Act."

In view of the suggestions for improvements and revisions in the Administrative Procedure Act which are being made today, this appears an appropriate time to take a closer look at the manner in which foreign affairs functions have thus far eluded the procedural requirements of that Act.

In the optimistic days of 1945 and 1946 which brought about passage of the statute, an exclusion from its provisions was entrusted to certain agencies on the assumption that, due to the nature of their function, they could best determine themselves when to adhere to its suggested standards for informing the public and providing for due process guarantees. The House Judiciary Committee analysis of the bill is particularly instructive as to this attitude:

> "But these exceptions are not to be taken as encouraging agencies not to adopt voluntary public rule-making procedures where useful to the agency or beneficial to the public. They merely confer a discretion upon agencies to decide what, if any, public rule-

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[1] Preface: House of Representatives Committee on Government Operations, Committee Print, *Survey and Study of Administrative Organizations, Procedure and Practice in the Federal Agencies,* (December 1957) (hereafter referred to as *RESPONSES*).

> making procedures they will adopt in a given situation within their terms."[2]

The question becomes, so to speak, whether the agencies have "abused" this discretion placed trustingly in their hands.

The Foreign Affairs Function Exemption

The exemption in question is from the rule making and adjudication requirements of the Act and reads as follows:

> (RULE MAKING)
>
> "Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States . . ." [rule making is required].
>
> (ADJUDICATION)
>
> "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent there is involved * * * (4) the conduct of military, naval, or foreign affairs functions; . . . ."

Legislative History of the Foreign Affairs Function Exemption from the APA

The foreign affairs function exemption from the provisions of the Administrative Procedure Act, as such, is not one of those concepts which formed part of this legislation from its early origins. While early versions of the proposed statute designed to bring order out of the procedural chaos caused by a "headless fourth branch of government" did not contain the exemption, they did treat its predecessor concept, containing very often the exclusionary language "Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest."[3] Another version only excluded "matters concerning the conduct of the Military or Naval Establishment, or the selection or procurement of men and materials for the armed forces of the United States. . . ."[4] Thus the background thought to the concept was in the context of protecting the conduct of diplomacy where such activity necessarily required secrecy and exclusion of public scrutiny.

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[2] Legislative History, Administrative Procedure Act, 79th Cong., 2d Sess., Sen. Doc. No. 248, p. 257; see also Senate Report, *id.* at 199, containing slightly different phrasing.

[3] S. Doc. No. 248 at 139, 147, 156, 177; § 2, H.R. 339, 78th Cong., 1st Sess.; §§ 2, 3, H.R. 1117, 79th Cong., 1st Sess.; §§ 3, 4, H.R. 1203, 79th Cong., 1st Sess.; *Id.* at 177, 180, §§ 2, 6, H.R. 2602, 79th Cong., 1st Sess.

[4] *Id.* at 134; § 301(d), H.R. 184, 79th Cong., 1st Sess.

The addition of the actual phrase "foreign affairs" occurred in one proposed bill in the following manner:

> "SEC. 201. EXCEPTIONS.—Whenever expressly found by an agency to be contrary to the public interest, the provisions of this title, in whole or part, shall not apply to (a) the conduct of military, naval, or national defense functions, foreign affairs, or activities beyond the territorial limits of the United States affecting the relations of the United States to other nations. Such findings shall be published unless, in any given case, the President shall in writing direct the withholding of such publication." [5]

It was also treated in a further section as follows:

> "SEC. 301. EXCEPTION.—Nothing contained in this title shall apply to or affect any matter concerning or relating to—
>
> * * *
>
> "(b) diplomatic functions or foreign affairs, except in cases where particular citizens or residents of the United States are parties; . . ." [6]
>
> (The thought here apparently was not to exempt individual cases, but rather only matters of national concern.)

Thus the phrase "foreign affairs" was added to the previous "diplomatic functions," used conjunctively, and eventually replaced the prior term.

From this it is not inappropriate to tentatively conclude that the function to be protected was one of a high order whereby the dealings of the United States with other countries was involved to the extent that a finding could be made that needed secrecy was required to the public interest. In other words, the exception was one concerning subject matter at the highest level. The history of the Act as passed tends to confirm this conclusion.

As indicated above, the early versions of the exemption were connected to the question of secrecy in the public interest. However, as passed, Section 3 of the APA omitted any exemption from its public information requirements based on foreign affairs or diplomatic functions, but merely adopted the standard elsewhere used in former bills of excluding "functions of the United States requiring secrecy in the public interest." But, even here, the explanation was made that while this exception is necessary, it ". . . is not to be construed to defeat the purpose of the remaining provisions. It would include confidential operations in any agency . . . but no further functions or operations. . . ."[7]

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[5] *Id.* at 166; H.R. 1206, 79th Cong., 1st Sess.

[6] *Id.* at 169.

Further, at the time of Committee consideration of this legislation, it was suggested that "foreign affairs functions" should be defined and added to Section 2 in order to exclude from the operation of the measure all passport and visa functions as well as all duties of consulate and diplomatic officers abroad. It was further stated: "However, so far as these are not foreign affairs functions requiring secrecy in the public interest, there would seem to be no reason why they should not be subject to the simple public information requirements of Section 3."[8] The intent appears, therefore, to exclude functions requiring secrecy rather than to relieve any and all foreign affairs duties from the public information requirements of the Act.

The Committee analysis of the exemption from the requirement of rule making contained, of course, the following often quoted statement:

> "They apply only 'to the extent' that the excepted subject matter is clearly and directly involved. The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any agency operation merely because it is exercised in whole or part beyond the borders of the United States but only those 'affairs' which so affect the relations of the United States with other governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences."[9]

That statement was repeated in both Committee reports on the bill as passed and stated in substance by the sponsor of the legislation on the floor of each house of the Congress during debate.

The Senate committee comment to this section went on to further state:

> "None of these exceptions, however, is to be taken as encouraging agencies not to adopt voluntary public rule-making procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rule-making procedures they will adopt

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[7] *Id.* at 198.

[8] S. Doc. No. 248 at 12.

[9] *Id.* at 257.

> in a given situation within their terms. It should be noted that the exceptions apply only 'to the extent' that the excepted subjects are *directly* involved" [10] (Emphasis supplied, since the word "directly" does not appear in the statute itself; the House Report used the phrase "clearly and directly" involved.)

The Act did not, either by its terms or its stated policy, exempt particular agencies from its coverage.[11] It bears note that the clearly stated approach of the Senate committee charged with the responsibility of drafting, holding hearings on, and reporting on the Act was not to exempt administrative agencies from its coverage, but to refer to types of functions solely:

> "The committee feels that it has avoided the mistake of attempting to over-simplify the measure. It has therefore not hesitated to state functional classifications and exceptions where these could be rested on firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War and Navy Departments in the performance of their other functions. Manifestly, it would be folly to assume to distinguish between 'good' agencies and others, and no such distinction is made in the bill." [12]

These remarks were repeated in substance on the floor of the Senate by Senator Pat McCarran.[13]

All of the above considerations which were had with reference to exemption from the rule-making provisions of Section 4 of the Act were repeated with equal force as to the adjudication requirement of Section 5. The "military, naval, and foreign affairs functions" exemption from the adjudication requirement of Section 5 of the APA was stated to be made "for the same reasons as they are exempted from Section 4 . . . ," and the further comment was made that ". . . in any event, rarely if ever do statutes require such functions to be exercised upon hearing." Once again, reference was made to the applicability of the exemption only "to the extent" that the subject is involved and ". . . it may be added, only to the extent that such subjects are *directly* involved." [14] (Emphasis, once again, supplied.)

A final clarification of the limited meaning which was intended to be given to the term "foreign affairs" was made during the House debate on the bill by Congressman Walter of Pennsylvania, who described the foreign affairs exemption as follows:

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[10] *Id.* at 199.

[11] S. Rep. No. 752, 79th Cong., 1st Sess., *id.* at 192.

[12] *Id.* at 191.

[13] *Id.* at 302.

[14] *Id.* at 202.

> "The exempted foreign affairs are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the general public is ordinarily not directly concerned." [15]

With somewhat of an eye on the future, Senator McCarran did state, during the course of the Senate debate, that:

> "Almost any provision of the bill, if wrongly interpreted, or minimized, may present occasion for supplemental legislation." [16]

In view of this background, the responses of the Department of State to the Dawson Committee questionnaire may be more intelligently interpreted.

THE RESPONSES OF THE DEPARTMENT OF STATE

The Department of State took the general position in 1957 that the major portion of its activities would, by their nature, be exempt from the operation of the Administrative Procedure Act under the foreign affairs exemption. The introductory general comment to the Department's response is illuminating as to its attitude:

> "Once again it may be pertinent to observe that a major portion of the Department's activities would appear to rest outside the purview of the Committee's questionnaire, exempted as they appear to be by virtue of the fact that they deal with foreign affairs or internal operations of the agency. Nevertheless, in every instance possible, questions have been answered for each function which might be even remotely related, so that the Committee may be able to judge for itself the applicability of the questionnaire and the general or background usefulness of the information submitted.
>
> "Although conceivably exempt from the provisions of the Administrative Procedure Act in regard to many of its operations, the Department of State applies the principles and policies enunciated in that act to as many activities as practical. This was pointed out in regard to rule making and to adjudication and is equally applicable to procedures cited in §§ III to IX of the questionnaire." [17]

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[15] *Id.* at 358; see also *id.* at 360.

[16] *Id.* at 326.

[17] *Id. Responses, supra,* at page 975.

Despite the above explanation the question remains whether the responses of the Department of State to the question of exemption do anything further than assert across the board a blanket exemption based on the foreign affairs function.

Part VIII of the Dawson Committee questionnaire reads as follows:

> "EXEMPTIONS FROM THE ADMINISTRATIVE PROCEDURE ACT.
>
> "1. Are any of your functions exempt from any of the provisions of the Administrative Procedure Act?
>
> "2. If so, describe and state reasons therefor. (Where answers given above relate in whole or in part to this section, please make cross-reference.)"

Of the eight offices, divisions, or bureaus of the State Department whose responses were transmitted to the House Committee all eight invoked the foreign affairs exemption. The degrees of its invocation varied.

The International Exchange Service simply stated:

> "1. IES rule making functions are exempt by virtue of the 'foreign affairs exemption' contained in Section 4, Public Law 404, 79th Congress.
>
> "2. See above."

The Historical Division (Public Affairs) injected the thought that its work might *indirectly* be worthy of exemption, by the following reply:

> "Studies contracted for at the request of the Historical Division may indirectly affect the formulation of foreign policy on a particular subject and hence would fall within the foreign policy exemption of the Administrative Procedure Act. (Sec. 4, Public Law 404, 79th Cong.)"

The attitude reflected by this response would seem to indicate that the State Department interprets the exemption exactly contrary to the exhortation in the legislative history that exceptions apply only to the extent that excepted subjects are directly involved.[18]

As to a number of its offices, the Department merely invoked the exemption with no explanation at all. In particular, as to the Federal Reserve (Bureau of Economic Affairs) no comment is made other than for the single line reply: "*VI, VII, VIII and*

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[18] *Id.* at 199.

IX not applicable." With respect to the Passport Office (Bureau of Security and Consular Affairs) the across-the-board exemption was invoked, *i.e.:* "1. All are exempt. 2. Foreign affairs functions:"

The reply on behalf of the Office of Special Consular Services (Bureau of Security and Consular Affairs) simply stated: "The balance of the numbered questions included in parts VII to IX but not referred to above, do not particularly apply to the functions for which the Office of Special Consular Services is responsible." Similarly, the Department invoked a categorical exemption claim for the Office of Munitions Control (Bureau of Security and Consular Affairs):

> "1. All functions in this section are exempt from any of the provisions of the Administrative Procedure Act.
>
> "2. Since the operations of the Office of Munitions Control are concerned entirely with foreign-affairs functions and with functions related to the national military security interest, they are exempted."

As to one or two of the claimed exemptions some explanation was made. For the Visa Office (Bureau of Security and Consular Affairs), the reply was as follows:

> "1. Certain functions are exempt from the provisions of the Administrative Procedure Act.
>
> "2. The function of rule-making under Section 4 of the Immigration and Nationality Act is considered a foreign affairs function of the United States within the meaning of Section 4 of the Administrative Procedures (sic) Act and, therefore, exempt from the requirement of proposed rule making and delayed effective date. To the extent that diplomatic and consular officers of the United States who issue and refuse fisas are involved in 'adjudication' as that term is defined in the Department's qualifying memorandum of December 26, 1956, such function would also be considered exempt as a foreign affairs function from the requirements of Section 5 of the Administrative Procedure Act."

and for the Lend-Lease and Surplus Property Division (Bureau of Economic Affairs) the following response was made:

> "1. Believe all functions are exempt from Administrative Procedure Act.
>
> "2. Settlement of Lend-Lease accounts involves negotiations with foreign governments: hence not susceptible to unilateral rules. Settlements also involve conduct of foreign relations as same situation prevails with respect to contracts with foreign governments for sale of surplus property.

> "In case of claims presented in connection with contracts for sale of surplus property to individuals, the procedure for processing the claims led to a statement of position of the Department as a party to the contract. Such position is subject to review by the General Accounting Office and Court in *de novo* proceedings."

Little purpose exists in a detailed analysis of the few explanations made in the responses since it is apparent from the above that the Department of State has taken the view for all practical purposes that the foreign affairs function exemption provides almost total freedom to its divisions and bureaus from the APA. The Department appears to have taken the literal words of the statute and applied them out of the context of the legislative history which gives meaning to the extent and purpose of the exemption. While it may be true that on the face of the statutory language itself it is possible to conclude that any activity, no matter how remotely connected, and although related only indirectly to a question having foreign touchstones, would be exempted from the Act, it is submitted that this was far from the intention of the drafters of the Act or the Congress upon its passage. If anything, a reading of the legislative history above described demonstrates that the foreign affairs exemption was always keyed to matters in their nature secret, or having to do with highest level diplomatic functions, or with negotiations or relationships that would have international consequences, as was clearly indicated by the remarks of Congressman Walter and the Committee Reports referred to above. This background appears to have been entirely lost sight of in the State Department's attitude toward the APA and the serious quesion is raised whether the exemption itself, as presently drawn, serves to carry out the purpose for which it was apparently designed.

In this regard, it seems appropriate for the Congress at this time to reconsider the manner in which the foreign affairs exemption has been interpreted and apparently misapplied by the Department of State with a view toward deciding whether this deviation from the original intent of the statute is sufficient to warrant repeal of the exemption itself as it presently is written. In this connection, thought should be given to keying the exemption even more to the national security objective sought rather than to the mere subject description of "foreign affairs." No reason readily appears why any specific subject as well as any particular department or agency should be granted an exemption when the major objective in view is to keep from the rule making, publication, and hearing requirements of the Act primarily secrets of State or of a confidential matter of a high order. The statute could just as effectively be written in terms of operative consequences rather than in terms of a subject matter designation which has thus far led to extremely loose interpretation by the agency involved.

We all realize that the proper conduct of foreign affairs by the United States in an era of international tension should not be hampered by unnecessary and burdensome dealings with the public. However, it is just such willingness to attempt a balance between the national interest as represented by the Federal Government and the public interest as represented by individual citizens and interested groups that has allowed us to maintain an open society and which constitutes one of the hallmarks of our system of government. Every conceivable effort should be made toward finding a balance between interests of the Government as represented here by the Department of State and our continuing interest in assuring free and open procedures to all members of the public wherever possible.

Specific approval is given by this Committee to the treatment given to the problem discussed above by H.R. 9926 of the 87th Congress, 2d Session. It is believed that enactment of this recodification of the APA in the course of which the foreign affairs exemption is deleted should be in the public interest.

Franz M. Oppenheimer, *Chairman*
Committee on Foreign Affairs

RECENT DEVELOPMENTS IN ORGANIZATION AND PROCEDURES OF THE INTERSTATE COMMERCE COMMISSION

I

In the latter part of 1960 a subcommittee under the chairmanship of Reagan Sayers was appointed to study, analyze and report to the full Committee with respect to a number of reports, surveys and studies having to do with the organization and procedures of the Interstate Commerce Commission. The subcommittee's report was presented as information at the 1961 Midyear Meeting of the Council of the Section; and it was subsequently published in the *Administrative Law Review* under the title "Observations on the Organization and Procedures Survey of the ICC: A Subcommittee Report" (13 Ad. Law Rev. 183).

After review and consideration by the full membership of the Committee, a partial final report was submitted at the 1961 Annual Meeting of the Section (13 Ad. Law Rev. 263, 267). Reserved for further consideration, however, were certain matters dealt with in recommendations numbered (6), (7), (8) and (9) of the subcommittee's report. These recommendations involve certain aspects of:

(6) Intermediate review;
(7) Format and style of reports;
(8) Notation voting; and
(9) Character of proceedings involving determination of major issues. To pursue further the study of these particular problems an *ad hoc* subcommittee (again chaired by Mr. Sayers) was appointed. The report of that subcommittee follows:

REPORT OF SECOND AD HOC SUBCOMMITTEE ON INTERSTATE COMMERCE COMMISSION PRACTICE AND PROCEDURES SURVEY

The first ad hoc subcommitte on Interstate Commerce Commission Organization and Procedures of the Section of Administrative Law Committee on Interstate Commerce was constituted on November 23, 1960 with the "obligation to study and report the section on certain reports dealing with the Interstate Commerce Commission."

As reported by the Chairman of the Committee on Interstate Commerce in 13 *Administrative Law Review* 267 et seq., the report of the

First Ad Hoc Subcommittee was published under the title "Observations on the Organization and Procedures Survey of the ICC: A Subcommittee Report" at 13 *Ad. Law Rev.* 183.

The Second Ad Hoc Subcommittee was constituted on June 13, 1961 for the specific purpose of the further study and consideration of the First Ad Hoc Subcommittee Recommendations (6)-(9), inclusive.

Interim Modifications in Procedure by Commission

Since January 1, 1961 the Interstate Commerce Commission's reorganization program has included action to accomplish the following:

(1) Strengthen the position of the Chairman, re-emphasizing that the chairman is the executive head of the Commission, responsible to the Commission for the executive and administrative functions of the Commission.

(2) Create the post of vice-chairman, through whom the seven regulatory bureaus report to the chairman.

(3) Consolidate the Commission's four divisions into three divisions of three commissioners each, with the three proceedings bureaus reporting to the chairman of the Commission through the chairmen of the respective divisions.

(4) Limit the right of appeal to the entire Commission generally to cases involving issues of major transportation importance.

(5) Authorize assignment of responsibility to individual commissioners for opinion-writing involving final decisions.

(6) Create two Operating Rights Boards, three Finance Boards, three Motor Carrier Boards, two Safety and Service Boards, the Released Rates Boards, and the Special Permissions Board, all for the purpose of expediting action, and to permit the boards to handle substantial areas of delegated responsibility and authority, so as to permit the Commissioners to devote more time to transportation issues of broad significance. It has been estimated that these twelve boards and other organizational changes now in effect will relieve Commissioners from considering more than 17,000 proceedings annually which previously would have required action by the entire Commission, a division or individual Commissioners.

(7) Establish the section of reports in the Bureau of Accounts.

(8) Delegate authority to the Director of the Bureau of Inquiry and Compliance to institute civil injunction proceedings involving motor carriers, and to recommend to the Department of Justice or to the United States Attorney institution of various criminal prosecutions for civil forfeiture proceedings.

Status of Recommendations (1)-(5) and (10)-(12), Inclusive

It will be seen from the modifications and changes made by the Commission since Janaury 1, 1961 that the substance of Recommendation (1) has been complied with, except for so much of the recommendation as relates to the continuation of the chairman in office at the pleasure of the Commission without pursuing a policy of rotation. It is our understanding that the Commission contemplates the continuation of its policy of annual rotation on a seniority basis so as to permit all members of the Commission to serve a one year term as chairman on a rotation basis. The subcommittee feels that this is not for the best interest of the Commission or those of us practicing before the Commission. For example, the present Chairman, Everett Hutchinson, has performed yeoman service, and it would appear that his reelection as such chairman on an annual basis for periods to round out a minimum of three years of service as chairman would serve to permit him to follow through with the executive policies which have been put into effect during this first year of his tenure as chairman. While it is not necessarily the view of the subcommittee that the chairman should be perpetuated in office, we do feel that a reasonable term should be afforded to him beyond one year to permit of the proper execution of his executive policies undertaken.

Recommendations (2), (11),[1] and (12)[2] are self-excuting and require no comment. Recommendation (10) is self-explanatory and requires no further comment.

As seen hereinbefore, the Commission is apparently exerting every effort to comply with Recommendation (3).

Recommendation (4) relates to according full status as authorized by the Civil Service Commission to Hearing Examiners. At the present time the maximum grade accorded Hearing Examiners by the Interstate Commerce Commission is Grade 15. We concur with the policy heretofore announced by the House of Delegates in according higher status to Hearing Examiners so as to encourage and foster the availability of trained and competent Hearing Examiners at all times, so as to permit the recruitment of proper personnel, and to encourage the retention of such personnel in the Commission's service rather than having them lured to private industry and endeavor.

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[1] Recent legislation (Public Law 87-247, approved September 14, 1961) empowers the Commission to delegate to boards of 3 employees the decision of cases heard by a hearing examiner, subject to the right to petition for reconsideration by an appellate division. Under this legislation and under the Commission's recent orders delegating certain functions to employee boards, there has been no attempt to confer finality upon the decisions of such boards; rather, their decisions are subject to petitions for reconsideration by the appropriate appellate division.

[2] A typographical error appears in Recommendation (12) as previously made, and it should correctly read:

> "The Commission is to be commended for its recent modification in limiting the right of appeal. The limitation should not affect the substantial rights of the parties on matters of general transportation importance."

Recommendation (5), relating to the abolition of the institutional decision and in lieu thereof imposing responsibility on individual commissioners and hearing officers for decisions has been met with, in the main, by the Commission's modification of its own practice on February 13, 1961 in announcing a procedure applicable to cases submitted to a division or to the entire Commission for initial decision or reconsideration on and after March 1, 1961, whereby opinion-writing supervision was given to individual commissioners and whereby, as I understand it, the individual commissioner will sign and have supervision of the contents of the reports of the division or the Commission. This is not to say that the action of a division or of the Commission should become the individual action of the opinion-writing commissioner who signs the report, but it does abolish the anonymity of the report heretofore condemned in Recommendation (5). We are satisfied that this action of the Commission, if continued in force, will accomplish the purpose of Recommendation (5).

RECOMMENDATION (6)

This recommendation of the First Ad Hoc Subcommittee provided:

> "(6) A reorganization should be made as to the intermediate review by non-hearing officers with anonymous recommendations made by such non-hearing officers to the Commission. In lieu thereof, individual Commissioners should have responsibility for and sign their own decisions, assisted by lawyers permanently assigned to their staffs. At no time should reports and recommendations of Hearing Examiners be reviewed by employees of lower status and less experience."

Recommendation (6), of necessity has been modified to a very material extent by the adoption, in substance, by the Commission of Recommendation (5) in the fixing of responsibility for opinion-writing or individual commissioners.

Assuming the continuance of the announced policy and program, little reason exists to include the language of the first two sentences, and also there should be eliminated the last sentence in such recommendation which now reads:

> "At no time should reports and recommendations of Hearing Examiners be reviewed by employees of lower status and less experience."

While we adhere to the language contained in the original recommendation as above quoted, if the responsibility for supervision of the opinion and/or report is to be that of an individual Commissioner, the quoted language in the last sentence becomes surplusage. Experience only can demonstrate the feasibility of this plan of Commissioner supervision of reports and its practical application by the Commission.

While it appears that the original Recommendation (6) is now moot and that substitute and more appropriate language should be employed, nevertheless it is the view of the subcommittee that the anonymity of the report and decision should be forever abolished. Accordingly, we recommend substitute Recommendation (6) as follows:

> "(6) On February 13, 1961 the Commission announced a reorganization effective as to cases submitted to a division or to the entire Commission for initial decision or reconsideration on and after March 1, 1961, so as to give opinion-writing supervision to individual Commissioners, to enable the Commissioners to exercise more individual responsibility in the preparation of the final reports on those cases generally which have been the subject of an oral hearing and which requires a division or Commission report. While time has not permitted of sufficient experience in the practical application of this policy, the Commission is to be commended for its affirmative action in the abolition of the anonymous decision by the institutional process. The Committee recommends that individual Commissioners should have supervision of and sign their own decision, assisted by lawyers permanently assigned to division staffs." [3]

RECOMMENDATION (7)

Although the Subcommittee understand that the Commission's staff is presently giving consideration to material modification in the format and style of the Commission's reports, it is the view of the Subcommittee that positive action in this regard should be taken by the Commission at an early date. In conformity with our views, we recommend:

> "(7) In order to increase the precedential value of the Commission's reports, less space should be taken up in recitation of the facts and contentions of the parties and greater attention should be given to the basic and underlying rationalization on reaching statutory criteria."

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[3] The modification of this recommendation is to provide for assignment of lawyers to division staffs, rather than to individual Commissioner staffs. The Subcommittee is of the opinion that this will aid consistency and uniformity of views and policies in division reports.

RECOMMENDATION (8)

One of the biggest problems facing us was as to the recommendation, or the absence thereof, to be made by us respect to the issue of "constructive" sessions and notation voting. Recommendation (8) of the First Ad Hoc Subcommittee was:

> "(8) The procedure of making determinations by notation voting, or constructive sessions, as distinguished from disposition of proceedings in conference, should be dispensed with, whether the determination by the entire Commission, a division of the Commission, or an employee Board. The responsibility for handling every such proceeding before a conference of Commissioners should be assigned to an individual Commissioner, and the responsibility for handling before an employee Board should be on an individaul member of the Board."

The legality of constructive sessions by notation voting is established by *T.S.C. Motor Freight Lines, Inc., and Herrin Transportation Co., Inc.* v. *United States et al.,* 186 F. Supp. 777 (S.D. Texas, 1960) aff. —— U. S. —— 6 L. Ed. 2d 387 (1961). We particularly commend for consideration the discussion by Circuit Judge John R. Brown at 186 F. Supp. 784-786, inclusive, and the footnotes therein, for a clarification of the applicable state decisions and the involved procedure.

In the light of the foregoing decision, we are not concerned with the *legality* of the notation voting procedure, but we are concerned with the *procedural desirability* of such practice.

It has long been the contention of some that it is procedurally desirable for all division and Commission reports to be considered in conferences by the body from which they are to emanate, prior to their finality and publication. The procedure referred to in Recommendation (6), of assigning the supervision of the opinion-writing of decisions to individual Commissioners, would serve to abolish the stigma of anonymity heretofore attached to Commission decisions and reports, but it will not serve to assure a consideration of such report by each member, or a majority, of the division or Commission from which the report is to emanate. Many appellate courts follow an informal procedure of assignment of individual cases to individual judges, the preparation and circulation by the assigned judge of an opinion to the other members of the court to afford them an opportunity to write a different opinion of concurrence or dissent, and then a physical conference between members of the court is held to determine the majority views. As expressed in some of the cases footnoted in the opinion of Judge Brown, supra, it is the view of the majority of the subcommittee that physical contact between voting Commissioners after the supervision of the drafting of the opinion by an individual Commissioner and an opportunity for study by other Commissioners, would impose the greatest safeguard on the propriety of the opinions and decisions of the Commission in the formulation of a pronounced National Transportation Policy.

What has been said with respect to constructive sessions by the Commission and its divisions is equally applicable to action taken under delegation of authority by employee Boards.

A contrary view on the use of notation voting exists in some quarters, and apparently the Commission itself informally adheres to this contrary view. This contrary view is that the notation voting procedure "provides that the proposed report or other document under consideration will be circulated among the Commission members who may either record their votes on the document or in separate memoranda. Any Commissioner desiring to explain his vote may do so and his explanation must be distributed to the other members. Commissioners may consult each other informally in the process of voting and any single Commissioner has the right to require that the matter be considered at a face-to-face conference of the full Commission." [4] This view is that the notation voting procedure is administratively expeditious in the light of the case load of the Commission, and that with 20 years' knowledge of the Commission's notation voting procedures, Congress has not made any effort to supersede those procedures.

While it is evident that the Commission adheres to the notation voting procedure by virtue of the continued use thereof, no statement has been issued by the Commission with respect to its position on such a matter.

Informal conferences pertaining to the notation voting procedure have been held by the Subcommittee members with various representatives of the Commission. One such informal conference by the Chairman of the Subcommittee with Commissioner Abe McGregor Goff has demonstrated to the Subcommittee the practical problems with which the Commission is confronted should it elect to be bound by the conference voting procedure. Commissioner Goff has advised that he personally, and he believes other members of the Commission are in accord, is in wholehearted agreement that the conference voting procedure is the preferable procedure and that in theory he agrees with the substance of prior Subcommittee Recommendation (8). However, the case load use of the Commission is so great as to render impracticable the compulsory use of the conference voting procedure. In order to test the efficacy of the conference voting procedure in normal cases, a test has been run by the Commission by first using the notation voting procedure, followed by the conference voting procedure on the same cases; not one single vote differed in those particular cases on which the test was run from the results received in the notation voting procedure and the results achieved by the conference voting procedure. On the other hand, increased use is now being made by the Commission of the conference voting procedure on matters of general transportation importance and highly controversial cases, to the end that wherever practicable in the more important cases the conference voting procedure is being used at present. Commissioner Goff has informally expressed the view that to require the Commission to use the conference voting procedure in all cases would unduly impede expeditious handling of the case load by the Commission. This Subcommittee is highly persuaded by the practical problems presented by this able Commissioner, and has carefully considered these practical problems in reaching its recommendation as hereinafter set out. It is noteworthy that under present procedure that any member of the Commission or a division may call for a conference consideration and vote, and Commissioner Goff has advised that this power is being increasingly used.

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[4] P. 9, Motion to Affirm filed by the Department of Justice and the Interstate Commerce Commission in No. 837, Herrin Transportation Company, v. United States of America, et al., supra.

The view has been expressed by one member of our Committee [5] that although notation voting is not so desirable as conference consideration, it is unreasonable to require the Commission to adhere to the suggested conference procedure in all formal cases because of the Commission's vast case load. Alternatively, such member would require that under Section 17(1) and (2) of the Interstate Commerce Act where the division or employee board shall consist of not less than 3 members, that the decision of such division or board should represent the combined judgment of all 3 members, rather than of a majority. While the Supreme Court has required all members of a 3-judge court to participate,[6] on the only occasion where the precise question was presented, a Circuit Court has held [7] that in view of the quorum requirements of Section 17(3) of the Interstate Commerce Act, action by all members of a division is not required. However, the view has been expressed that such decision is not dispositive, because therein no timely petition for reconsideration has been filed under Section 17(9) of the Act. But regardless of the legality of action by a quorum as distinguished from all members of a division or board, this committee member has suggested as an alternative to Recommendation (8) the following:

> "(8) Although Section 17(3) of the Act provides that 'A majority . . . of a division, or of a board shall constitute a quorum for the transaction of business, paragraphs (1) and (2) of Section 17 require

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[5] Walter D. Matson.

[6] Ayrshire Corp. v. United States, 331 U.S. 132, 137-139.

[7] Northern Valley Transfer, Inc. v. I.C.C., 192 F. Supp. 600 (March 24, 1961).

> divisions and employee boards to consist of not less than 3 members. These requirements should not be defeated by the failure of a member to participate in a matter and, accordingly, no final action should be taken by a division or an employee board without the participation of the designated 3 members or their alternates."

In the light of the practical considerations involved in this issue, this Subcommittee recommends:

> "(8) a. Whenever feasible and expeditiously proper, the disposition of proceedings by the Commission, its divisions and boards by conference consideration and voting is to be encouraged and fostered, in lieu of determination by notation voting or constructive sessions. Commissioners should make greater use of their right under the constructive session procedure to call for conference consideration of controversial matters, and all matters of general transportation importance should be the subject of conference consideration.
>
> b. Although Section 17(3) of the Act provides that 'A majority . . . of a division, or of a board shall constitute a quorum for the transaction of business,' paragraphs (1) and (2) of Section 17 require divisions and employee boards to consist of not less than 3 members. These reqiurements should not be defeated by the failure of a member to participate in a matter and, accordingly, no final action should be taken by a division or an employee board without the participation of the designated 3 members or their alternates."

RECOMMENDATION (9)

An exhaustive study has been made by Frank B. Hand, Jr., of Washington, D. C., a member of both subcommittees, relating to Recommendation (9) and abolition by the Commission of the practice of making policy determinations affecting carriers and the public generally in what otherwise appear as relatively unimportant adjudicatory proceedings without prior notice given of the fact that policy issues are involved. This study pointed out instances of modification of determinations in ex parte proceedings by subsequent decisions in adjudicatory proceedings,[8] what commodities may be transported by a so-called "heavy hauler" with authority to transport "commodities which, because of their size or weight, require special equipment: which has been the subject of many ad hoc adjudicatory proceedings decisions without determination in an ex parte proceeding, what constitutes "articles of unusual value" and the determination that such exception to general commodity authorization prohibits transportation of silver coin and bullion.[9] In the latter matter in the dissent of Commissioner Webb it is seen that there is a division among the Commission itself on the question of determining matters of general transportation policy in ad hoc adjudicatory proceedings, for Commissioner Webb wrote:

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[8] See Descriptions in Motor Carrier Certificates, 61 MCC 209 (Ex Parte MC-45); *Reader Bros. Inc., Ext.-Philadelphia,* 64 MCC 805; *P. B. Mutrie Motor Trans., Inc., Ext.-Bainbridge, N.Y.,* 69 MCC 161; *Southern Tank Lines, Inc. Ext.-St. Bernard, Ohio,* MC-109637 sub 74; *The Maxwell Co., Ext.-Addyston,* 62 MCC 10 and 63 MCC 677.

> "In my opinion, however, the evidence of record is too meager to support the majority's findings that opposing common carriers, by reason of the 'articles of unusual value' exception, lack authority to transport silver coin and bullion. This conclusion is obviously one of general transportation importance. It determines the scope of the authority held by hundreds of carriers of general commodities, some of whom are presently handling traffic now found to be proscribed. Since the conclusion is unnecssary in the disposition of this proceeding and is not supported by an adequate record, future determination of this important issue has been prejudged to some extent."

In another case [10] which was a simple application involving a single commodity in a tank vehicle, the Commission decided the industry-wide question of whether a motor carrier requires specific authority to transport empty trailers owned by a shipper.

In another case [11] in a compaint proceeding the Commission interpreted Ex Parte MC-37, rather than reopening the ex-parte proceeding as has been suggested.

In another simple application proceeding,[12] the Commission has the determination made that all substances are either animal, vegetable, or mineral, and that tall oil is a vegetable oil. It is contended that this should have been the subject of an ex parte proceeding upon notice.

In a simple "grandfather" application proceeding under the Transportation Act of 1958,[13] the Commission determined that "agricultural commodities" does not include frozen fruits and frozen vegetables; rather than making such a determination in an ex parte proceeding after notice of the issue.

While it appears that the primary complaint as to the determination of matters of grave transportation importance in simple applications, is lack of notice of the issue determined and a completely inadequate record, one Subcommittee member[14] contends case-to-case determination permits the Commission to gradually inform itself of a particular problem and of permitting of some experimentation. He raises the further problem that if all of these matters are deemed of grave transportation importance, requiring special proceedings, the administrative burden and decisional delay might be substantial.

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[9] *Wells Fargo Armored Service Corp. Ext.-Denver, Colo.* (MC-3083 Sub 33, May 3, 1961— MCC—.)

[10] *P. B. Mutrie Motor Transportation, Inc., Ext.-Benzyl Chloride,* 83 MCC 123.

[11] Prue Motor Transportation v. P. B. Mutrie, 84 MCC 153.

[12] *Hearin Tank Lines Ext.-Texas,* 81 MCC 101.

[13] *Lester C. Newton Trucking Co. Common Carrier Appn.,* MC-113388 Sub No. 26, decided April 28, 1961, — MCC —.

One member of the Committee[15] has suggested that the necessity for Recommendation (9) would be lessened if the Commission were to utilize in appropriate situations the declaratory order procedure authorized by the Administrative Procedure Act and if Recommendation (7) concerning the quality of reports as precedents were effectuated. An example of this is that Section 303(b) of the Interstate Commerce Act exempts transportation by water of bulk commodities "which are (in accordance with existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." The language is subject to varying interpretations by members of the bar. Efforts to obtain Commission determination of the various interpretations have failed since the Commission has steadfastly refused to entertain petitions with respect thereto.

Another Committee member[16] has suggested the requirement that the following 4 questions be answered in the affirmative before compelling the Commission to entertain a petition for a declaratory order or interpretative ruling:

1. Absent the petition, would there be in existence a "controversy" or "uncertainty" of which the Commission should take cognizance in a formal proceeding?
2. Would such controversy or uncertainty involve a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"? 5 U.S.C.A. § 1004.
3. Would issuance of a declaratory order effectively "terminate a controversy or remove uncertainty"?
4. Would the public interest, as distinguished from the subjective interest of the petitioner, be served by the institution of a formal proceeding as contemplated by the petition?

While the majority of the Subcommittee is of the view that the criteria suggested in the 4 questions are inherent in the Commission's declaratory order jurisdiction, we would not include such in the specific recommendations for action.

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[14] Robert W. Ginnane.

[15] Richard M. Freeman.

[16] Walter D. Matson.

A position contrary to the adoption of Recommendation (9) may be founded upon an argument that to require all matters of general transportation importance to be determined in ex parte proceedings would unduly impede expeditious processing of adjudicatory proceedings by the Commission. The majority of the subcommittee adheres to a contrary view, as we feel that "policy determinations affecting carriers and the public generally" should be accorded a narrow construction, such as matters of general importance affecting the National Transportation Policy, classification of carriers, interpretations affecting classes of carriers as distinguished from individual carriers, and the like. We would not undertake to include in ex parte proceedings or other rule making proceedings matters relating to the determination of the sufficiency of the evidence in particular proceedings or the like, and in consequence thereof, do not feel that the Commission's expedition would be hampered in any manner by the adoption of such a course of conduct; contrarily, we feel that if the Commission would make greater use of ex parte or other rule making proceedings, it would serve to expedite the determination of individual ad hoc adjudicatory matters by Hearing Examiners and individual Commissioners, as those reporting and deciding officers would have the benefit of the pronounced policy of the Commission in the preparation of their reports and decisions.

In the light of the considerations, it appears fundamental that the major issues of general transportation importance affecting policy should be determined through ex parte proceedings or other rule making proceedings, rather than in ad hoc adjudicatory proceedings. In consequence thereof, this Subcommittee reaffirms Recommendation (9) and recommends its adoption as follows:

> "(9) The major issues of general transportation policy should be determined through ex parte proceedings or other rule making proceedings rather than in ad hoc adjudicatory proceedings. At present, many policy determinations affecting carriers and the public generally are made in what otherwise appear as relatively unimportant adjudicatory proceedings without prior notice given of the fact that policy issues are involved."

It is not the purpose of the Subcommittee to recommend a stereotype procedure before the Commission. However, it is the purpose of your Subcommittee to make positive recommendations for what we deem to be the betterment of the practices and procedures before the Commission in the light of the many studies which have been made on the subject in recent months. We deem it exceedingly encouraging that the

Commission is undertaking to study its own practice and procedure and to improve them, and we feel that the Commission is to be commended for its positive action in that direction.

We recommend the adoption of this report by the Committee on Interstate Commerce.

REAGAN SAYERS, *Chairman*
Ad Hoc Subcommittee

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The full Committee on Interstate Commerce has approved and adopted the foregoing report of the *ad hoc* subcommittee, and it is submitted hereby to the Section of Administrative Law.

ADMINISTRATIVE STANDARDS—ICC OPERATING AUTHORITY

At the suggestion of the chairman of the Section a subcommittee of the Committee on Interstate Commerce, under the chairmanship of Frank B. Hand, Jr., has been appointed to examine and report upon the question of whether the administrative standards "public convenience and necessity" and "public interest" as they relate to ICC operating authority are susceptible of definition distilled from decisions of the Commission and courts applying the phrases and, if so, whether such definition would be desirable.

As of this writing the subcommittee has not yet reported.

ADMINISTRATIVE CONFERENCE STUDY—ICC LICENSING OF TRUCKING.

A preliminary draft of a lengthy study of Interstate Commerce Commission licensing of trucking ("Licensing of Truck Operations by the Interstate Commerce Commission: Study Conducted by the Committee Reporter") prepared for the Committee on Licenses and Authorizations of the Administrative Conference of the United States by its reporter was, at the request of the chairman of that committee, comprehensively and carefully reviewed by the membership-at-large of our Committee on Interstate Commerce. Comments were submitted, as suggested, to the committee reporter.

ADMINISTRATIVE CONFERENCE RECOMMENDATIONS—JUDICIAL REVIEW OF ICC ORDERS.

As a result of action taken at its Second Plenary Session (December 5-6, 1961) the Administrative Conference of the United States has made the following recommendations, *inter alia,* to the President:

RECOMMENDATION NO. 3

IT IS RECOMMENDED to the President that:

(1) review of Interstate Commerce Commission orders should be upon appeals to the United States Courts of Appeals in all cases where at present a special three judge court is used; District Courts should be relieved of their jurisdiction under 28 U.S.C. § 1336, and the Courts of Appeals should have exclusive jurisdiction to review these orders of the Commission;

(2) final review of orders of the Interstate Commerce Commission by the Supreme Court of the United States should be only by petition for a writ of certiorari;

(3) review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

RECOMMENDATION NO. 4

IT IS RECOMMENDED to the President that procedures for judicial review of orders of the Interstate Commerce Commission by Courts of Appeals should incorporate the following features:

(1) A limit of 60 days should be imposed as the time within which a petition for review must be filed in any case for which the preset statutory provisions do not fix a period for filing petitions for review, such 60-day period to run from the date of entry of the order appealed from or entry of an order denying reconsideration thereof where petitions for reconsideration are allowed by the Commission's rules, whichever is later.

(2) Appeals should be commenced by the filing of a petition for review in the form of a notice of appeal.

(3) Anyone seeking review should be required to serve notice of appeal upon all parties to the proceeding before the Commission, the Department of Justice, and the Commission.

(4) When several appeals are taken from the same order of the Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should be considered as taken to the same court, consolidated therewith, and handled as one appeal.

(5) The Commission should provide the record of its proceedings on appeal and should transmit the record to the court. Until such time as procedures are developed whereunder the Commis-

> sion may use mechanical facilities and methods for the production of the record in its proceedings in such form as to obviate printing or other reproduction of the record for judicial review, and provision is made for designation of record after the filing of briefs, as recommended by the Conference, the record on appeal should consist of the entire record before the Commission, and should be transmitted to the court within the time allowed for the filing of briefs. The record should be returned to the Commission upon final decision of the appeal.

These very important recommendations made by the Administrative Conference in respect of judicial review of orders of the Interstate Commerce Commission, together with pertinent background materials relating to them, were submitted to the full membership of the Committee on Interstate Commerce for study, consideration and comment. On the basis of comments received it would appear that our committee favors recommendation No. 4 but is fairly evenly divided as to the merits of recommendation No. 3.

Under the circumstances, then, our committee is not prepared to recommend either support of, or opposition to, recommendation No. 3 of the Administrative Conference. It is suggested, however, that this is a matter as to which the Section of Administrative Law may wish to adopt a position.

Administrative Conference Study—Conduct of ICC Rate Proceedings

There have been made available to the Committee on Interstate Commerce copies of a preliminary draft of a lengthy report captioned "The Conduct of Rate Proceedings in the Interstate Commerce Commission," prepared as the report of a study conducted by the reporter for the Committee on Rulemaking of the Administrative Conference of the United States. This document has been furnished to the membership-at-large of our committee for review and comment, with a view toward submitting to the committee reporter at a later date such suggestions as may be thought appropriate.

Harry J. Breithaupt, Jr., *Chairman*
Committee on Interstate Commerce

ADMINISTRATIVE REGULATION OF MARITIME TRANSPORTATION

The Committee on Maritime Transportation was reorganized last fall to reduce its size for the sake of efficiency and at the same time to retain a fairly wide geographical representation by having one member from the principal port cities on the Atlantic, Gulf, and Pacific coasts. The program of the committee, after it was reorganized, comprised the following objectives:

First, preparation for a rule-making proceeding before the Maritime Administration and its Subsidy Board and the newly created Federal Maritime Commission, incorporating essential subpoena and discovery procedures similar to those long available in the federal courts for use in connection with litigated proceedings before the agencies.

Second, preparation for a rule-making proceeding clarifying and regularizing the disclosure of certain types of documents and information in the files of the agency, such as formal applications and exhibits thereto, staff recommendations, and possibly General Counsel's opinions.

Third, the definition by rule of the functions and obligations of the Administration's "Public Counsel" and the Commission's "Hearing Counsel."

Fourth, the development with the agencies of procedures for the formulation and publication of policy statements concerning the administration of certain statutes, such as the Cargo Preference Statute, section 19 of the Shipping Act, 1920, and the availability of construction-differential subsidy for tankers and dry cargo vessels in the foreign trade, as well as formal public statements of accounting rules in connection with regulation of common carrier rates in the non-contiguous domestic trades.

When, on October 10, 1961, the Federal Maritime Commission and the Maritime Administration each published a proposed rule in the Federal Register disbarring all attorneys now practicing before them and requiring applications to be filed for admission to the agencies' bars together with a fee of $10, opposition to these proposed rules became a part of the committee's program.

Because of the urgency of the matter, opposition to the proposed rules disbarring lawyers already admitted to practice, and assessment of a separate fee together with unspecified and unpublished standards for re-admission to the agencies' bars became the committee's first order of business. All members of the committee agreed that the proposed rules should be vigorously opposed and there was some disposition to take more stringent measures should opposition be unsuccessful. Because of the time limitations on submitting of comments in response to the agencies' proposed rules, it was impossible to obtain the approval of the Council of the Administrative Law Section. However, a memorandum of law developed in co-operation with the Administrative Law Division of the Maritime Law Association was prepared and submitted by a number of individual lawyers regularly practicing before both Maritime agencies in their individual names. In addition, interest developed in the Senate Judiciary Committee on the subject, and Senator Keating, who felt very strongly on this general subject, was good enough to communicate with the Federal Maritime Commission and the Maritime Administration.

In the end, the Maritime Administration and the Maritime Subsidy Board adopted a rule which obviated completely the objections of the committee. The new rule provides that all attorneys at law admitted to practice before the federal courts or before the courts of any state or territory of the United States may practice before the Maritime Administration and Maritime Subsidy Board.

A copy of the draft discovery rules (including a subpoena rule) is attached hereto. The vice chairman of our committee suggests that the draft be modified to provide in rule 9(c) that the minimum notice of taking of depositions should be five days rather than "reasonable notice" with a provision for a shorter period upon a showing of cause, in order to eliminate the uncertainty and delay from possible litigation as to the meaning of "reasonable notice."

In addition to the proposed discovery rules, the committee has prepared a draft rule providing for the disclosure of agency documents. The vice chairman of the committee suggests that that rule, insofar as it refers to written opinions of the Office of the General Counsel, should be modified to provide that General Counsel's opinions be confidential until the particular transaction involved has been acted upon, and thereafter be disclosed so that they may be used as precedents.

On behalf of the committee, I recommend and request that the

Council approve the text and substance of the attached proposed subpoena, deposition and discovery rules and the attached proposed rule for disclosure of agency documents with the modifications in each case suggested by the vice chairman of the committee, and that it authorize the committee to file a petition for proposed rule-making pursuant to section 4(d) of the Administrative Procedure Act and section 4(c) of the Rules of Practice and Procedure of the Maritime Administration, Maritime Subsidy Board, and the Federal Maritime Commission; also that the committee be further authorized to file briefs, comments, and memoranda in support of such proposed rules.

The committee proposes during the coming year to continue the program herein described and to undertake or suggest appropriate expansion thereof.

MARK P. SCHLEFER, *Chairman*
Committee on Maritime Transportation

APPENDIX

PROPOSED AMENDMENTS TO FMC RULES OF PRACTICE

1. SUBPOENAS

The following are proposed amendments to Rule 9, dealing with subpoenas. The proposed changes are adapted from Rule 45 of the Federal Rules of Civil Procedure. The portion of the Federal Rule on which each proposal is based is noted in brackets after the paragraph:

Substitute the following paragraphs in lieu of present paragraph (a) of Rule 9:

"Rule 9—Subpoenas

"(a) *Issuance.* The presiding officer shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. Proof of service of a notice to take a deposition as provided in Rule 12 constitutes a sufficient authorization for the issuance by the presiding officer of subpoenas for the persons named or described therein.

> [The first sentence of this proposal is adapted from the last sentence of F.R.C.P. Rule 45(a); the second sentence is adapted from the first sentence of F.R.C.P. Rule 45(d)(1)]

"(b) *For the Production of Documentary Evidence.* The subpoena may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the presiding officer, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things."

[Adapted from F.R.C.P. 45(b)]

Redesignate paragraphs (b) and (c) of Rule 9 as paragraphs (c) and (d) respectively.

2. DEPOSITIONS AND DISCOVERY

The following are proposed amendments to Rule 12, dealing with depositions and discovery. The proposed changes are adapted from the Federal Rules of Civil Procedure. The Federal Rule on which each paragraph is based is noted in brackets after the paragraph:

Substitute the following paragraphs in lieu of present paragraphs (a) and (b) of Rule 12:

"Rule 12—Depositions and Discovery

"(a) *Taking Depositions.* Except as otherwise provided in an order made pursuant to Rule 12(d), any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the proceeding or for both purposes, except that leave, granted with or without notice, must be obtained if notice of the taking is served by any party within twenty days after service of the order or pleading which institutes the proceeding. The attendance of witnesses or the production of documents may be compelled by the use of a subpoena as provided in Rule 9. Depositions shall be taken only in accordance with this Rule.

[Adapted from F.R.C.P. 26(a)]

"(b) *Scope of Examination.* Unless otherwise ordered as provided in Rule 12(e), the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or of any other party including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the evidence sought will be inadmissible at the hearing if it appears reasonably calculated to lead to the discovery of admissible evidence.

[Adapted from F.R.C.P. 26(b)]

"(c) *Notice to Take.* A party desiring the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the presiding officer may for cause shown, enlarge or shorten the time. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used as other depositions.

[First three sentences adapted from F.R.C.P. 30(a); last sentence adapted from F.R.C.P. 29]

"(d) *Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the presiding officer may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed, the deposition shall be opened only by order of the presiding officers, or that business secrets or secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer; or the presiding officer may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as above provided. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the presiding officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such an order, the presiding officer may impose upon either party or upon the witness the requirement to pay such costs or expenses as he may deem reasonable."

[The first sentence is adapted from F.R.C.P. 30(b); the balance from F.R.C.P. 30(d)]

Redesignate paragraphs (c) to (k) inclusive as paragraphs (e) to (m) inclusive, respectively.

3. Disclosure of Agency Documents

Add a new paragraph to Rule 1(e) as follows:

"(3) Minutes of meetings of the Commission or Maritime Subsidy Board and actions of the Administrator together with the proposal, contract, transaction or recommendation approved or disapproved; written opinions of the Office of the General Counsel of the Commission or the Administration; and final staff recommendations to the Commission, Maritime Subsidy Board or Administration may be inspected at the Washington office of the Commission or Administration, as the case may be, by any person having a proper interest therein, except where the subject matter is (i) specifically exempt from publication by statute, (ii) found by the Administrator or, in the case of the Commission, by the Commissioner, in findings personally verified by him or them under oath, to be required to be kept secret in the protection of the national security, (iii) submitted in confidence pursuant to statute or agency rule or direction, or (iv) such that its disclosure would be an unwarranted invasion of personal privacy."

ANALYSIS OF RECENT PROPOSALS IN THE FIELD OF ADMINISTRATIVE REGULATION: REPORT OF THE NATIONAL COMMITTEE

This report must necessarily be interim in nature inasmuch as Congress is still in session. The chief purpose of the report is to catalogue measures of interest to the Section. It is not only likely but practically certain that there are measures which should be included in this list which are not. If our attention is directed to any such omissions, at least one purpose of the report will have been fulfilled.

An effort has been made to categorize the various bills by subject matter. This has not been wholly successful because some bills cut across a variety of interests. For example, measures specifying hearings generally provide for judicial review as well. Cross referencing assists in noting dual areas of interest, but is not complete in this catalogue. Suggestions as to the manner in which lists should be arranged in the future would be most welcome.

The measures involved are not reported here by their titles. Rather each caption attempts to suggest the area of a bill which may be of interest. This is frequently impossible to tell from the caption given each bill by the Congress. In most instances the bill itself must be read before one knows it is a bill we need to consider. By this same token, Congress might not recognize a bill by the captions used in this report because frequently our area of possible interest is only a very narrow part of a much larger piece of proposed legislation. After each caption, the bill number, sponsor, committee and some note on status is shown. There has been some effort also to indicate related bills, but it is doubtful that this catalogue references every measure pending on a particular matter.

Those items enacted into law are noted by an asterisk.

Adjudications

*Delegation of functions by FCC, to expedite process; repeal of review staff provisions and related functions, S. 2034 Pastore (D. R.I.), P.L. 87-192, August 31, 1961.

*Delegation of functions, by ICC, S. 1667, Magnuson (D. Wash.), H.R. 8033, P.L. 87-247, September 14, 1961.

Delegation of functions, by FPC, S. 1605, Magnuson (D. Wash.), Commerce. No hearings held. Bill on Senate calendar. H.R. 6956, companion bill, no action taken.

Delegation of functions, by SEC. S. 2315, passed Senate September 1, 1961. Pending House—Interstate and Foreign Commerce. No action to date.

Establishment of Board of Public Land Appeals in Department of Interior. S. 3107, Gruening (D. Alaska), Interior and Insular Affairs. No action scheduled.

Administrative Procedure Act

Proceedings to comply with under amendment of Home Owners Loan Act of 1933—H.R. 6560, Multer (D. N.Y.), Banking and Currency. No action taken and none scheduled.

Amend to provide for disclosure of communications from members of Congress re matter under adjudication. S. 637, Javits, Keating (R. N.Y.), Judiciary. No hearings held, none scheduled, none likely.

Codification of, with amendment, S. 1887 Erving Ervin (D. N.C.), Judiciary. No hearings and none scheduled. H.R. 9926, Walter (D. Pa.), Judiciary. Nothing scheduled, hearings this session possible.

Amend to clarify and protect right of public to information. S. 1567, Carroll (D. Colo.), Hart (D. Mich.), Long (D. Mo.), Proxmire (D. Wisc.), Judiciary. (Related bill, to amend Sec. 3 of APA, S. 1907, Proxmire, Judiciary). No action taken, none scheduled, some action possible.

Amend to prohibit agency issuance of prejudging statements on pending cases. H.R. 10058, King (D. Utah); H.R. 10077, Pike (D. N.Y.), Judiciary. No action taken, none scheduled or in prospect.

Codification of various postal laws. Providing for a Judicial Officer in the Post Office Department to be "the agency for the purposes of the requirements of the APA," to extent that functions are delegated to him. H.R. 173, H.R. 10432 (clean bill), Willis (D. La.), Judiciary. Passed House without hearings. Pending before Senate Judiciary (Subcommittee on Codification).

Equal Pay Act. Applicability of Sections 5, 6, 7 and 8 of APA in connection with inquiries by Secretary of Labor under authority to act on any discrimination by reason of sex in wage payments. H.R. 10575, Dwyer (R. N.J.), Education and Labor.

H.R. 11677 (clean bill), Zalenko (D. N.Y.). Reported to House May 17, (H. Rept. No. 1714), no specific reference to APA in bill as reported.

(For other amendments to APA see *Hearing Examiners.*)

Aviation

To amend FAA to assure independent participation by CAB in court proceedings; circuit court review of Board determinations made without hearings; clarify time for seeking judicial review. H.R. 7310, Williams (D. Miss.), Interstate and Foreign Commerce. Hearings held August 1961, unpublished. Still in subcommittee. No action scheduled. S. 957, Magnuson (D. Wash.), Commerce. No action taken, none scheduled.

To amend FAA to provide for supplemental air carriers under special operating authorization through procedures to be established (hearing to be discretionary and license to be deemed not within Sec. 9(b) of the APA). S. 1969 (Monroney amendments of February 26, 1962), Commerce. Passed House and Senate. Still in conference.

Atomic Energy

Procedures re licensing of atomic reactors H.R. 8708, Holifield (D. Calif.), S. 2419, Pastore (D. R.I.), Atomic Energy. Hearings held April 17, 1962, Messrs. Berger and Plaine testified. Committee consideration scheduled circa June 1, 1962. (Association, Section Liaison).

Communications

To amend FCC Act of 1934 to give FCC certain regulatory authority over TV receivers. H.R. 8031, S. 2109, Magnuson (D. Wash.), Commerce. Senate Hearings held February 1962. House bill passed, ordered reported by Senate Committee May 18, 1962.

Communications satellite systems, ownership and procedures re H.R. 11040, Harris (D. Ark.), (clean bill), Commerce. (Related bills H.R. 10115, 10138, S. 2650, S. 2814, S. 2890, H.R. 9907). Hearings held, Parts 1 and 2 printed. Reported to House (H. Rept. No. 1636), passed May 3, 1962. Pending before Senate Commerce. Action expected circa June 1. (Senate hearings were on S. 2814).

Proposed Radio Frequency Allocation Act. H.R. 1162, Interstate and Foreign Commerce. No action scheduled. (Note: Bill is similar to H.R. 8426, 86th Congress, to which continuing objection was voted by ABA).

Conflicts of Interest; Improper Influence; Standards of Conduct; Ex Parte Matters

Code of ethics for regulatory agencies, H.R. 14, Harris (D. Arkansas), Interstate and Foreign Commerce. Hearings held June 1961. Related Bills: H.R. 351, 537, 820, 1138, 3450, 4812). No action scheduled.

Presidential establishment of ethical standards of conduct of the business of the executive branch. S. 1843, Carroll (D. Colo.), Hart (D. Mich.), Government Operations. No action taken, none scheduled.

Standards of conduct (re ex parte matters) for agency proceedings of record. S. 1844, Carroll (D. Colo.), Hart (D. Mich.), Judiciary. No action, none scheduled.

Conflicts of Interest. H.R. 8140, Cellar (D. N.Y.), Judiciary. Passed House August 7, 1961. Referred to Senate Judiciary Committee, hearings scheduled for May 22, postponed indefinitely but hearings appear certain at some time together with action before end of session. Related Bill S. 1902, Eastland (D. Miss.).

Enforcement

*Amending Small Business Investment Act of 1958 to provide for cancellation or other actions against licenses and judicial review thereof, S. 902, H.R. 8870. P.L. 87-341, October 3, 1961.

Fees

Re fixing of attorneys' fees in cases where law authorizes agency action to do so. H.R. 1139, Bennett (D. Fla.), Judiciary. No action, nothing scheduled.

Forfeitures

Imposition of, for certain violations of FCC rules and regulations. S. 1668, Magnuson (D. Wash.), Commerce. Passed Senate June 12, 1961. Companion bill H.R. 6581, Moulder (D. Mo.), Interstate and Foreign Commerce. Hearings February 16, 1962 at which Mr. Beelar appeared for Section. S. 1668 signed into law as P.L. 87-448, May 11, 1962.

Gas and Power

To amend Natural Gas Act to provide greater authority for FPC hearing examiners and to impose time limits on the rendering of decisions. S. 666, Magnuson (D. Wash.), Commerce. Hearings held May 25, June 5, 7, 19, 1961. No further action scheduled.

Hearing Examiners

Appointment of, to amend APA re—H.R. 5194, Boggs (D. La.), Judiciary. No action, nothing scheduled.

Compensation of, to amend APA re—H.R. 5655 Cellar (D. N.Y.), Judiciary. No action, nothing scheduled.

Increasing responsibilities and authority of, to amend Sections 7 and 8 of APA re—S. 1734 Carroll (D. Colo.), Hart (D. Mich.), Long (D. Mo.) Judiciary. Hearings held. Matter still in subcommittes but some action likely this session.

Exemption of, from appointment under APA, for Indian Probate work. Interior Department appropriations provision in the Budget. Introduced as H.R. 10802, Appropriations. Passed House, reported by Senate.

Hearings

Full "evidentiary" hearing before any change by FCC of hours of broadcasting. S. 2918. Curtis (R. Neb.), Commerce. No action, nothing scheduled.

Notice and hearing in certain circumstances before classification by Secretary of Interior of highest and best use of tracts of public lands. H.R. 7788, Aspinal (D. Colo.), H.R. 10454 Rhodes (R. Ariz.), Interior. Hearings held. Pending before subcommittee. No action scheduled. Companion bill S. 2219.

Public hearing before extending coverage of Meat Inspection Act to new areas. H.R. 10770 Sullivan (D. Mo.) Agriculture. No action, nothing scheduled.

Subversive Activities Control Act amendments relating to proceedings and penalties re front organizations. H.R. 9944, Doyle (D. Calif.), H.R. 10560, Holifield (D. Calif.), Un-American Activities. No action, nothing scheduled.

Immigration and Nationality

Amendments to Immigration and Nationality Act. S. 3043, Hart (D. Mich.). Pending in subcommittee, awaiting Departmental reports.

Judicial Review

*To limit, re orders of deportation. H.R. 187, Walter (D. Pa.). This measure was APA opposed but passed House and was incorporated in S. 2237 subsequently passing both Houses. Signed into law as P.L. 87-30.

Of final action by Commissioner of Education on a State plan for Federal college level assistance, H.R. 10396, Brademas (D. Inc.), Education and Labor. Hearings scheduled for May but deferred. No rescheduling as yet.

Of veterans claims, H.R. 849, 775 and others, Veterans Affairs. Hearings held February 20, 21, 26, March 1, 5, 1962. APA supports. Mr. Berger appeared. (Reorganization of count of claims, to create an Appellate Branch, and trial Branch. S. 1235, Eastland (D., Miss.), H.R. 6851, Walter (D. Pa.). Pending in subcommittee. No action scheduled.

Notice

Requiring agencies to furnish certain persons copies of notices or communications, H.R. 788, Multer (D. N.Y.), Judiciary. No action and nothing scheduled.

Providing for reasonable notice of applications to Circuit Courts for interlocutory relief against agency orders. H.R. 465, McCulloch (R. Ohio), Judiciary. Tabled. H.R. 5656 reported in lieu (H. Rept. No. 249, S. Rept. No. 835) and bill enacted into law as P.L. 87-228, September 13, 1961.

Office of Federal Administrative Practice

To establish, and to provide for appointment and administration of hearing commissioners, S. 2189, Keating (R. N.Y.), (Related bill H.R. 349, Fascell (D. Fla.)—adding provisions for a Legal Career Service and representation before agencies). No hearings and none scheduled.

To establish a Permanent Commission on Government Operations, S. 2727, Wiley (R. Wis.), Government Operations. No action, nothing scheduled.

Oaths

Eliminate requirement for on certain materials filed with FCC. S. 683, Magnuson (D. Wash.), H.R. 4113, Harris (D. Ark.). Interstate and Foreign Commerce. Senate bill passed by House in lieu of House bill and signed into law April 27, 1962 as P.L. 87-444.

Eliminate requirement for on certain materials filed with ICC and with other agencies. S. 2037, Magnuson (D. Wash.), Commerce. H.R. 7458, Harris (D. Ark.), Interstate and Foreign Commerce. No action taken.

Patents

Procedures, cancellations and judicial review in connection with certain patents involving drugs. S. 1552, Kefauver (D. Tenn.), Judiciary, H.R. 6245, Cellar (D. N.Y.), Judiciary. Hearings held in both Houses, hearings continue on House side. Section material coordinated with Patent Law Section.

Postal Matters

To transfer rate-making authority on carriage of mail by vessels from Postmaster General to Federal Maritime Commission. H.R. 204, Bonner (D. Tex.), Merchant Marine and Fisheries. Related Bill S. 2833. No hearings held, no action scheduled.

Practice

Any member of bar entitled to practice before all agencies. H.R. 177, Walker (D. Pa.), Judiciary. S. 1409, Keating (R. N.Y.), Bridges (R. N.H.), Hruska (R. Neb.), Judiciary. No action taken, nothing scheduled.

Rules and Regulations

Authorizing Congressional Committee review of agency rules and regulations prior to final promulgation. H.R. 6784, Moulder (D. Mo.), Rules. Rules decided it did not have jurisdiction. Effort to refer to Judiciary refused. No further action scheduled or anticipated. ABA opposes.

State Department

Administration of security and consular affairs in the Department of State, and of refugee matters. H.R. 10079, Walter (D. Pa), Judiciary. Passed House, March 13, 1962. Senate ordered to lie on table, has not yet referred bill to a Committee.

Summary Procedures

Permitting, by FCC, in certain license applications after opportunity for hearing. H.R. 7895, Harris (D. Ark.), Interstate and Foreign Commerce. S. 2108, Magnuson (D. Wash.), Commerce. No action taken, nothing scheduled.

Terms of Office

Providing uniform 10-year terms for members of certain agencies. S. 1842, Carroll (D. Colo.), Hart (D. Mich.), Government Operations. No action taken, none scheduled.

Trade

Notice and hearings and judicial review in connection with provisions for adjustment assistance and otherwise before Tariff Commission, under "Trade Expansion Act of 1962," H.R. 9900, Mills (D. Ark.), Ways and Means. Hearings held March 12-April 11. Clean bill H.R. 11970 filed, expected to be reported by Committee to House on June 12.

Attention is also invited to a report by Senator Carroll's Subcommittee on Administrative Practice and Procedure, issued on May 9, 1962 (S. Rept. No. 1480). This report emphasizes that although improvements within the existing agency structures have been made, the real need is "to examine the structure itself." The report discusses S. 1734 at some length. As indicated above, under *Hearing Examiners,* this measure is expected to receive further action by Senator Carroll's group before the end of this session of Congress. The general conclusion of the report is that improvements in the administrative process must be sought and found.

While noting the desirability of "procedural regularity," the report notes that such regularity is "not a complete assurance that the decisions of administrative agencies will satisfy the public or carry out the actual intent of the legislation under which they act." The report also notes: "By now, it has become apparent that the adversary type of proceeding, resembling as it does the processes of the courts, does not lend itself to the proper, efficient, or speedy determination of issues with which administrative agencies frequently must deal."

Mr. Beelar's thought provoking memorandum of May 14, 1962, relating to redefining the scope of National Committee activity, was received while the report of your Committee was in preparation. As of this date, over 15,000 pieces of proposed legislation have been generated by the 87th Congress, and that Congress is still going strong. Literally all of these bills are of importance to the ABA in gross and to review all of them to assure Committee study of all bills touching on our Section, "with a near 100 percent reliability," is a challenge which must be met successfully. In addition to utilizing the ABA Washington office, a Section Committee (whether called "National" or Federal Legislation") should assist in screening and assigning to act as a back-stop for the ABA Washington office, if nothing else. That job is that huge and important.

ROBERT L. MCCARTY, *Chairman*
National Committee

PROPOSED AMENDMENTS TO RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD

I

After exhaustive study, a task force headed by Board member Gerald Brown has recommended to the Board certain revisions in the Board's rules and regulations relating to unfair labor practice cases. In general, the proposed revisions would appear to comport with good administrative practice and should be adopted. The Committee, however, would like to offer certain specific criticisms (omitting criticisms of technical defects which the Board will no doubt discover itself).

II

SPECIFIC CRITICISMS

1. *Sec. 102.15—Complaint—When and by whom issued; contents service*

The proposed amendment would require the complaint to state certain specifics. We believe that the amendment should go further and require the complaint to state the specific relief requested and that the Board should be permitted to grant only that relief and no more. This will preclude the Board from granting any remedy that has never been sought by the General Counsel and therefore as to which the respondent never had a fair opportunity to be heard. *Cf. Honolulu Star Bulletin,* 123 NLRB 395, set aside 274 F.(2d) 567 (App. D.C.)

2. *Sec. 102.17—Amendment*

We assume that just as under the present regulations, the Board would recognize that it is powerless to amend a complaint without the General Counsel's concurrence. See *IUE* v. *NLRB,* 289 F.(2d) 757 (App. D.C.)

3. *Sec. 102.20—Answer to Complaint . . .*

(a) The amendment should make it clear that the rule does not call for evidence and legal argument—matters which are more appropriate for presentation at the hearing and in briefs.

(b) The amendment is redundant in twice calling for the answer to contain a short simple statement of the facts constituting the grounds of defense. Such redundancy should be eliminated.

(c) The rule fails to state the effect of pleading that the respondent is without knowledge of an alleged fact. The present rule states that that plea shall operate as a denial. We believe that this should be continued in the amended rule.

(d) The Committee believes that the rule should not give examples of what are considered defenses, lest the rule seek in this indirect fashion to establish substantive (and quite possibly erroneous) rules of laws.

One member of the Committee is of the view that contrary to the proposed rule, the answer should not be required to state the specific grounds of defense at all. He feels that a general denial should suffice and that if a proper investigation has been conducted in the first instance leading to the issuance of a complaint, a general denial will not hamper the General Counsel in preparing for trial.

4. *Sec. 102.23—Amendment to Answer*

The present Board rule permits such amendment at any time prior to hearing. The proposed rule would permit the amendment at any time prior to hearing if the complaint were amended but otherwise only "for good cause shown." This unnecessarily limits the respondent's right. Just as Sec. 102.17 permits the regional director to amend the complaint at any time prior to hearing, section 102.23 should confer the same unlimited right upon respondent to amend the answer prior to hearing.

5. *Sec. 102.35—Duties and Powers of Trial Examiners*

(a) One amendment to this section would allow the trial examiner to consolidate cases. It seems to the Committee, in the interest of avoiding prejudice to a party, that this should be allowed only after permitting the interested parties an opportunity to be heard on the consolidation, and that the rule should so provide.

(b) Another amendment here would permit the trial examiner at any time during the hearing to require the parties to state their respective positions. The Committee is opposed to this extreme requirement, believing that the statement of position would be too vague or would be conditioned upon a possible subsequent change of position depending upon developments at the trial. Accordingly, the requirement would be ineffective and ought not to be incorporated into the rules. As an alternative the Committee suggests that the rules establish pre-trial techniques as a means of narrowing the issues.

6. *Sec. 102.42—Filing of briefs . . . with trial examiner*

The trial examiner, in his discretion, should be authorized, as the proposed rule states, to require briefs, if he believes that he needs them to help write his report. But if he does require them or if the parties themselves decide to file them whether or not required by the examiner, the General Counsel's brief should be filed first. He is the complaining party and the respondent should know the cases and other matters upon which the General Counsel relies in order properly to prepare his brief. A reply brief from the General Counsel should then be allowed to answer respondent's brief. All of this is in conformity with common judicial procedure, and the rule should be amended to spell out these requirements.

7. *Sec. 102.44—Suspension or Disbarment*

(a) The word "lawful" should be inserted before the word "directions" on line 5 of subsection (a) so that the trial examiner would have authority to take action against an attorney or other representative of a party, only if said attorney or other representative should disregard the "lawful" directions of the trial examiner. This would protect such person from having to obey arbitrary directions of the trial examiner.

(b) The rule would permit suspension of an attorney who indulges in "dilatory tactics." We think this expression should be more fully explained or else eliminated. It is altogether too broad and vague.

(c) We think also that there should be included a requirement that the suspended attorney take his appeal to the Board within a prescribed time limit.

(d) The Committee is opposed (i) to characterizing the action of any attorney or other representative of a party as an unfair labor practice, as the proposed rule [subsection (b)] would do in describing what constitutes misconduct of an aggravated character and (ii) to subjecting an attorney to disbarment for committing such unfair labor practice. An attorney might find himself disbarred under the proposed rule just because he gave a mistaken interpretation of the Act or fought vigorously against a Board rule of law, which the Board itself might later reverse. Such reversals occur constantly in the field of labor law where there are hardly any absolutes. Moreover, an attorney's disbarment should be handled under the ABA canons of professional ethics and not by way of penalty for committing a so-called unfair labor practice. Still further, the words "in connection with, or at any stage of a Board proceeding," in describing when willful violation of the Act might result in disbarment, are much too vague. In short, the Committee feels that the amendments to subsection (b) should not be adopted.

8. *Sec. 102.45—Trial Examiners Decision and . . . Transfer of the case to the Board . . .*

The Committee has no quarrel with calling trial examiners' decisions "initial decisions," but it does question the statement in the task force report that Sec. 10(c) of the Act authorizes their being so called.

Subsection (b) is not too clear that the Board is to serve a copy of the trial examiner's decision upon the parties. This is just a matter of semantics, but we suggest that a clarification is in order.

9. *Sec. 102.46—Exceptions . . . oral argument*

(a) Subsection (c) spells out the rules governing exceptions. It should be made clear that an exception may be based upon improper conduct of the trial examiner. This is not clear as the proposed rule is written.

One Committee member believes that the words "substantive or procedural" in subsection (c) should be eliminated. As these words appear in the proposed rule, they limit the matters to which exceptions may relate. This Committee member feels that such limiting words are not precise and may well lead to difficulties in interpretation and application.

(b) Subsection (c) requires exceptions to contain citations of authorities. To avoid redundancy, this requirement should be eliminated in all cases where briefs are filed in support of exceptions.

(c) The requirement of a subject index and table of authorities in supporting briefs [see subsection (d)] should be limited to lengthy briefs, *e.g.* those over 20 pages.

(d) The rule should allow the combining of cross-exceptions and supporting briefs as proposed in subsection (g) with the answering brief permitted under subsection (e).

(e) The Committee (with one member dissenting) feels, contrary to the proposed subsection (h), that oral argument should be allowed as a matter of right in all unfair labor practice cases, as an invaluable aid to emphasis and clarity of the written argument. Only thus can the practicing bar be sure that those who decide the case actually know the issues and the contents of the record. The dissenting member believes that to allow oral argument in all cases would cause delays, contrary to the object of the rules to expedite the decisional process.

10. *Sec. 102.48—(Post Decisional Motions) . . . Action of Board upon expiration of time to file exceptions to trial examiner decision . . .*

(a) There are several references in subsection (d) of the proposed rule to "direction of election." We do not understand this reference in the context of rules dealing with unfair labor practice cases. "Directions of elections" are matters covered by the rules relating to representation cases.

(b) Subsection (d) would permit newly discovered evidence "or evidence which the regional director of the Board believes should have been taken at the hearing" to be taken at any further hearing. The Committee does not understand why the regional director's views on this matter should be entitled to more weight than that of any other party. We suggest the elimination of the quoted words.

One Committee member believes that subsection (a) of Sec. 102.48 should be amended to provide that the Board may in its discretion, and by so indicating within a specified period of time, examine an unappealed order of the trial examiner. The remainder of the Committee is dubious of the validity of such a provision in view of the language of Sec. 10(c) of the Act making such unappealed orders the orders of the Board. The same Committee member also suggests that Section 102.48 of the rules should provide that the trial examiner's findings of fact be accepted unless the Board finds them clearly erroneous based upon the record as a whole.

MILTON C. DENBO, *Chairman*
Committee on Labor

TRENDS IN THE REGULATION OF NATURAL RESOURCES

The Committee on Natural Resources recommends that the Section of Administrative Law of the American Bar Association approve the following Resolution and urge its adoption by the House of Delegates of the American Bar Association:

> "Whereas, S. 3107 (87th Congress) would require the establishment in the Office of the Secretary of the Interior of a three man Board of Public Land Appeals to hear, on behalf of the Secretary, appeals from final decisions of the Bureau of Land Management or the Geological Survey concerning the uses of or claims to public lands under the jurisdiction of the Department of the Interior, and would require the Board to comply with the provisions of the Administrative Procedure Act (5 U.S.C. 1001-1011), and in particular to give appellants an opportunity for a hearing on the record;
>
> "Whereas, In August, 1954 the Section of Administrative Law of the American Bar Association adopted a Resolution approving in principle a proposal by the Department of Interior then under consideration for regulations 'to provide a full hearing pursuant to the requirements of the Administrative Procedure Act before a hearing examiner, for cases arising under the jurisdiction of the Bureau of Land Management, when such a hearing is requested by any interested person who shall feel himself aggrieved by any initial decision rendered by a field or local office of the Bureau of Land Management.'
>
> "Whereas, Such regulations were never adopted, and the Department of the Interior has, over a long period of years, consistently declined to grant a hearing under the Administrative Procedure Act to any such appellants (except in the limited case of mining claimants), and has consistently declined to amend its procedures for reviewing such appeals to provide for a separation of functions between those administrative officials who decide and those who investigate and advise;
>
> *"Now, Therefore, Be It Resolved,* That the American Bar Association approves in principle the enactment of S. 3107 (87th Congress) or any other similar legislation calling for or requiring the separation of the functions of prosecution and adjudication and authorizing a hearing on the record with respect to appeals from any final decision of the Bureau of Land Management or the Geological Survey of the Department of the Interior concerning

> the uses of or claims to public lands under the jurisdiction of the Department of the Interior;
>
> "*Resolved Further,* That the Section of Administrative Law be and is hereby authorized to represent the American Bar Association in presenting the Association's views on this matter."

S. 3107 was introduced April 4, 1962 by Senator Gruening of Alaska. It is cosponsored by 13 other Senators: Chavez, N. Mex.; Morse, Ore.; Dworshak, Idaho; Bennett, Utah; Cannon, Nev.; McGee, Wyo.; Long, Hawaii; Neuberger, Ore.; Moss, Utah; Bartlett, Alaska; Hickey, Wyo.; Bible, Nev.; Church, Idaho. The bill has been referred to the Senate Interior Committee where it is awaiting a report by the Secretary of the Interior. Senator Gruening's remarks on introducing the bill explain its purpose and are attached hereto together with the text of S. 3107.

The basic changes in Departmental procedures to be effected by enactment of S. 3107 have been sought by this Committee for ten years. In 1953 this Committee first pointed out the inadequacies of Departmental procedures to provide any semblance of an APA type hearing for applicants under the public land laws. In 1954, the Committee proposed and the Section adopted the Resolution referred to above to encourage the Department to voluntarily adopt new regulations authorizing a hearing when requested and requiring separation of functions. The Department in 1956 did adopt regulations authorizing a hearing before a field examiner, not when requested by an appellant, but solely in the discretion of the Director of the Bureau of Land Management. 43CFR, 1962 Supp. 221.6, 221.99(a), (b). In practice, however, this Committee is aware of only one or two instances where a hearing has ever been granted under the regulations, although thousands have been requested. Thus, at best, the 1956 Regulations are a valueless windowdressing which have accomplished no effective change in Departmental procedures. A flicker of hope gleamed again in 1956 when the Department decided in the *O'Leary* case (*U.S.* v. *O'Leary,* 63 I.D. 341 (1956)) that mining claimants are entitled to an APA hearing. But Departmental decisions in the following years closely limited *O'Leary* to public land applicants under the mining laws. The consistent Departmental position with regard to all other applications under the myriad of statutes relating to the public lands was recently reiterated when the Department denied a hearing under section 5 of the Administrative Procedure Act to oil and gas lease offerees under the Mineral Leasing Act. *Richard K. Todd, et al.,* A-28090 (October 30, 1961).

Last year this Committee reported the study by the Solicitor of the Department of several reorganization plans which would cure in varying degrees the defects of lack of opportunity for a hearing and lack of separation of functions, long noted by the Committee. As of the present no concrete plan for change has been recommended by the Department.

S. 3107 embraces the objectives long sought by this Committee as well as the Section to secure adherence by the Department of Interior to some of the basic principles established by Congress in the Administrative Procedure Act. While these basic concepts of administrative justice have long been adopted as part of the elemental jurisprudence of most government agencies and departments, the Department of the Interior has clung tenaciously to its pre-APA procedural concepts. The Committee and Section have patiently sought voluntary self-reform for ten years. The fruitlessness of this effort has brought the realization and conviction that legislation is required. Accordingly we recommend adoption of the above Resolution approving in principle S. 3107 to create a Board of Public Land Appeals in the Office of the Secretary of the Interior.

CHARLES F. WHEATLEY, JR., *Chairman*
Committee on Natural Resources

A BILL TO CREATE A BOARD OF PUBLIC LANDS APPEALS IN THE OFFICE OF THE SECRETARY OF THE INTERIOR

Mr. GRUENING. Mr. President, on behalf of myself and the senior Senator from New Mexico [Mr. CHAVEZ], the senior Senator from Oregon [Mr. MORSE], the senior Senator from Idaho [Mr. DWORSHAK], the senior Senator from Utah [Mr. BENNETT], the junior Senator from Nevada [Mr. CANNON], the senior Senator from Wyoming [Mr. MCGEE], the junior Senator from Hawaii [Mr. LONG], the junior Senator from Oregon [Mrs. NEUBERGER], the junior Senator fram Utah [Mrs. MOSS], my colleague, the senior Senator from Alaska [Mr. BARTLETT], and the junior Senator from Wyoming [Mr. HICKEY], I introduce, and send to the desk a bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals.

In order to give other Senators an opportunity to join in sponsoring this measure, I ask unanimous consent that the bill be printed in the RECORD at the conclusion of my remarks and that it be held at the desk until the close of business on April 10.

The VICE PRESIDENT. The bill will be received and appropriately referred; and, without objection, the bill will be printed in the RECORD and held at the desk, as requested by the Senator from Alaska.

The bill (S. 3107) to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes, introduced by Mr. GRUENING (for himself and other Senators), was received, read twice by its title, referred to the Committee on Interior and Insular Affairs, and ordered to be printed in the RECORD.

(See exhibit 1.)

Mr. GRUENING. Mr. President, the bill seeks to provide for an objective review of decisions by the Bureau of Land Management and the Geological Survey in the Department of the Interior. It would establish directly in the Office of the Secretary a Board of Public Lands Appeals, consisting of three persons. This Board, or skilled hearing examiners employed by the Board, would hear appeals from decisions rendered by the Bureau of Land Management concerning the uses or claims to public lands under the jurisdiction of the Department of the Interior. Appellants would be given an opportunity for a hearing either before a member of the Board or before a hearing examiner employed by the Board. The hearing would be held at a location convenient to the appellant. The Board's activities would be governed by rules and regulations promulgated by the Secretary of the Interior, and would be in accord with the provisions of the Administrative Procedure Act. Final decisions of the Board would be appealable to the U.S. Court of Appeals for the circuit in which the land involved is situated.

While provision is made in the bill to have the Board's decisions be in accordance with the applicable regulations issued by the Secretary, a specific provision of the bill authorizes the Board to call to the attention of the Secretary of the Interior any inequitable, unjust, or unintended application of the law, so that he may have an opportunity to remedy the regulations issued.

As a Senator from a State having a large amount of land owned by the Federal Government—not only far more, actually, than that in any other State, but also far more percentagewise—I realize that the actions of the Bureau of Land Management and the Geological Survey, in the Department of the Interior, concerning the uses of or claims to such lands, vitally affect many of the citizens of my State.

The many letters of complaint from Alaskans, which I have received over the years, concerning arbitrary action by officials of these two Federal bureaus indicate the need for the establishment of procedures to insure an objective review of the decisions made.

The laws and regulations governing the use and disposition of the public lands should be interpreted and applied uniformly and equitably.

This can be accomplished only if the initial decision is subject to objective administrative review, with ultimate recourse to the courts.

The Secretary of the Interior has been entrusted with the management of the public lands, and has been instructed by the Congress to permit their use for certain purposes, and their disposition under certain conditions.

Those conditions have been implemented by regulations issued by the Secretary of the Interior. Their administration in the first instance has been delegated to the various land offices of the Bureau of Public Lands throughout the Nation. Appeals from local decisions are appealable to the Director of the Bureau of Land Management here in Washington; thousands of miles away from the scene of the action and the location of the land. There is no right to a hearing; and, so far as an individual who appeals is concerned, he cannot afford the costs involved in such a hearing here in Washington.

From the decision by the Director of the Bureau of Land Management, a further appeal lies to the Secretary of the Department of the Interior. These appeals are handled by a special branch in the Office of the Solicitor of the Department. Here, again, there is no right to a hearing, and no practical machinery to bring the hearing to the place where the person who appeals lives.

Lack of an opportunity for a hearing is but one of the difficulties with the manner in which the Secretary of the Interior performs his functions with respect to the use and disposition of the public lands.

My second—and equally serious—objection to these operations is that there is no sharp division between the administrative power and the quasi-judicial power thus exercised in the name of the Secretary of the Interior.

Both the Associate Solicitor responsible for providing legal advice to the Bureau of Land Management and the Assistant Solicitor responsible for advising the Secretary of the Interior on the appeal from the decision of the Director of the Bureau of Land Management are responsible directly to the Solicitor.

Thus, the attorney advising on the initial decision and the attorney advising on the appeal are responsible to, and act under, the direction of the same individual, the Solicitor.

An individual appealing an adverse ruling must argue to an Assistant Solicitor, who is only a branch chief, that an individual standing higher in the bureaucratic scale—an associate solicitor and a division chief—was incorrect in his legal decision. That is certainly a most difficult case to argue. These two functions should be divided.

This is not the only Federal program in which this problem arises.

It was one of the reasons for the enactment of the Administrative Procedure Act, which, however, exempted actions dealing with the public lands.

Such a procedure is, however, as much needed for public-land use and disposition as in the performance of many other functions of the executive branch.

An objective, impartial board along the lines of the one which we propose for the Department of the Interior could be established by administrative action. The Secretary of the Interior, although I have repeatedly urged him to do so, has not seen fit to act.

However, a board along the same lines has been functioning for many years in the Department of Health, Education, and Welfare. It was established by administrative action with respect to the old-age survivors and disability program under title II of the Social Security Act. Surely a decision as to entitlement under that program is not necessarily more or less important than a decision as to whether a homesteader has complied with provisions of the law or a decision as to whether an applicant for an oil lease has similarly complied, or a decision as to whether an applicant for a grazing permit is entitled to it. A rebuffed and frustrated applicant for any of these public benefits should be entitled to an appeal to a tribunal which has in no way—either directly or indirectly—participated in the initial decision, or which can have its decision on appeal influenced by the maker of the original decision.

Those who seek, under the applicable provisions of the law, to use or obtain public lands should not be treated as though they were trying to deprive the Federal Government of something. The Congress has stated that the public lands may be used for certain purposes or may be disposed of under certain conditions. An applicant who complies with the conditions laid down should have his application granted. Applicants in Alaska, applicants in Oregon, applicants in Wyoming, or applicants in any of the other public land States are entitled to have those conditions interpreted uniformly and applied objectively.

I hope early hearings on my bill will be held, so that this much-needed administrative machinery can be established at the earliest possible moment.

EXHIBIT 1

S. 3107

A bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established in the Office of the Secretary of the Department of the Interior (hereinafter called the "Secretary") a Board of Public Lands Appeals (hereinafter called the "Board"), under the administrative control and supervision of a Chairman.

SEC. 2. The Board shall consist of a Chairman and two associate members, appointed without regard to the civil service and classification laws, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board.

SEC. 3. Members of the Board (including the Chairman) shall be appointed by the Secretary, with the approval of the President, and shall receive compensation at the annual rate of $——.

SEC. 4. Any final decision of the Bureau of Land Management or the Geological Survey of the Department of the Interior concerning the uses of or claims to public lands under the jurisdiction of the Department of the Interior may be appealed to the Secretary, and the Board shall hear and determine such appeals on behalf of the Secretary. Fnal decisions on such appeals, after giving the appellant an opportunity for a hearing at a location convenient to the appellant, shall be made by vote of a majority of the Board on the basis of the entire record.

SEC. 5. An appeal under this Act may be filed with the Secretary only by an individual, partnership, corporation, or other organization or a State (or political subdivision thereof) materially affected by the appealed decision.

SEC. 6. The Secretary shall establish rules and regulations governing the Board's procedures and activities, which rules and regulations shall be in accord with the provisions of the Administrative Procedure Act (5 U.S.C. 1001-1011).

SEC. 7. Hearings may be held before the entire Board or before a single member thereof or before an employee of the Board designated by the Chairman to conduct such hearings.

SEC. 8. The Board shall be bound in its decisions by the applicable regulations issued by the Secretary: *Provided,* That, if the Board finds that, as applied to a particular case or group of cases, the regulations issued by the Secretary would lead to an inequitable, unjust, or unintended application of the law, it shall recommend to the Secretary appropriate and legally justifiable changes in such regulations and shall delay its decisions on affected appeals until the Secretary has considered the changes suggested and has made a decision as to whether or not to promulgate such changes in the regulation.

SEC. 9. Appeals from final decisions of the Board shall be to the United States Court of Appeals for the Circuit in which the land involved is situated.

ADMINISTRATIVE PROCEDURES WITHIN THE POST OFFICE DEPARTMENT

The Special Committee on Postal Matters has considered at length the lack or absence of proper administrative procedure within the Post Office Department. Of continuing concern is the practice of the Post Office Department of issuing rules of procedure without complying with the 30-day notice requirement of the Administrative Procedure Act (5 U.S.C. Section 1003[c]). Specific examples of this failure to comply are the new rules promulgated December 31, 1961, pertaining to administrative proceedings, either governed by the Administrative Procedure Act or in which notice and hearing are required by rule. In some instances it does comply with the Act while stating that it does not regard its functions in this respect as being subject to the Act.

The Committee on Postal Matters recommends that it be authorized to continue its efforts to induce the Department to abandon its claim of exemption of so-called proprietary functions of the Department from the publication requirement, of the Administrative Procedure Act.

Pursuant to Council action of the Section of Administrative Law at its meeting August 6, 1961, at the Coronada Hotel in St. Louis (Item 14, p. 4, Council Minutes) the Committee has further pursued the matter of subpoena power in administrative hearings of the Department and has requested the views of the Postmaster General. No reply has been received.

The Postmaster General interprets the Act of February 14, 1929 (39 U.S.C. Section 6409) as not requiring compliance with the Administrative Procedure Act. That Act authorizes the Postmaster General to provide for the transportation of mail by vessels between the United States and foreign ports and pay (1) to an American flag vessel compensation not to exceed 80 cents a pound for letters and postal cards, and 8 cents a pound for other articles; and (2) to a vessel of foreign registry, compensation not to exceed the rates fixed from time to time by the Universal Postal Union Convention.

Title 18 U.S.C. Section 1724 provides that the Postmaster General may require the transportation by any steamships of mail between the United States and any foreign port at the compensation fixed under that authority of law (39 U.S.C. Section 6409). Upon refusal of the vessel to accept the mail when tendered the collector or other officer of the port empowered to grant clearance, upon notice of refusal, shall withhold clearance until the collector or other officer of the port is informed by the Postmaster General that the vessel has accepted the mail or that their conveyance is no longer required by the Postmaster General.

Under the authority thus given, rates are fixed unilaterally and made effective immediately upon promulgation.

Bills have been introduced in Congress designed to take away the rate-making authority from the Postmaster General. H.R. 204, now pending in the 87th Congress before the Committee on Merchant Marine and Fisheries, is designed to transfer the rate-making authority to the Federal Maritime Board. A similar bill (S. 2833) is also pending before the Senate Committee on Interstate and Foreign Commerce. No hearings have been held on either bill.

Both bills provide that—

> "Fair and reasonable rates and conditions of compensation shall be determined annually by the Federal Martime Board and shall be paid by the Post Office Department for the carriage of such mails on vessels of United States registry."

At the request of the Honorable Herbert C. Bonner, Chairman of the Committee on Merchant Marine and Fisheries, the Comptroller General submitted a report dated May 20, 1960, on an identical bill that was pending in the 86th Congress. The Comptroller General called attention to the provisions of 18 U.S.C. Section 1724 and suggested that in view of the interest of the Post Office Department in such rates, it would be proper for the Board, in fixing rates, to give the parties an opportunity to be heard.

The Comptroller General also called attention to 49 U.S.C. Section 1376 without comment. The section cited authorizes and directs the Civil Aeronautics Board, upon its own initiative or upon petition of the Postmaster General or an air carrier, to fix and determine from time to time, the fair and reasonable rates of compensation for the transportation of mail by aircraft, etc.

The Postmaster General, by letter dated July 14, 1961, to Chairman Bonner, objected to the passage of H.R. 204 in its existing form. While he had no objection to the transfer of the rate-making function from his Department to the Federal Maritime Board he does not recommend enactment of this legislation in its present form. The Postmaster General says—

> "The provisions of this bill do not establish the procedures which are generally accepted as essential in such rate making. The principal deficiency appears to be in the absence of provisions for notice and hearing, which are basic requirements in the present laws (39 U.S.C. 6209 and 49 U.S.C. 1376(a)) with respect to the rates set by the Interstate Commerce Commission for rail transportation and by the Civil Aeronautics Board for air transportation. Accordingly, it would appear that the subject bill should contain an express direction and authorization for the Federal Maritime Board to fix mail rates similar to that given to the Interstate Commerce Commission (39 U.S.C. 6208) and to the Civil Aeronautics Board (49 U.S.C. 1376(a)), unless the Federal Maritime Board is considered to have such general authority which covers the situation."

The Postmaster General further states that the bill neglects to repeal the law (39 U.S.C. Section 6409) which limits the amount of compensation payable to steamship companies, and that there are no provisions in the bill respecting (1) services and facilities, (2) schedules, (3) mandatory carriage of mail tendered, (4) method, by weight or otherwise, of basing rates, and other provisions which are in existence with respect to rate-making for air and rail transportation.

The Postmaster General desires to retain his existing authority to enter into contracts for transportation of mail between ports of the United States and between the United States or its territories or possessions on the one hand, and foreign countries on the other.

The Postal Committee of the Section of Administrative Law recommends that the Section go on record as in favor of (1) substituting the Federal Maritime Commission for the Federal Maritime Board * as the proposed rate-making authority in H.R. 204 and its companion bill in the Senate; (2) amendments designed to establish more definite standards for rate-making and detailed procedural requirements as to notice and hearing as recommended by the Postmaster General; and (3) repeal of 39 U.S.C. Section 6409, as suggested by the Postmaster General.

It is further recommended that the Section take no position

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* Under Reorganization Plan 21, the Federal Maritime Commission has succeeded the Federal Maritime Board.

with respect to the suggestion of the Postmaster General that he retain existing authority to contract for the transportation of mails by vessel beween the United States and foreign ports for terms of not more than two years under the provisions of 39 U.S.C. Section 6405.

Wm. I. Denning, *Chairman*
Committee on Postal Matters

DEVELOPMENTS IN THE ANALYSIS OF STATE ADMINISTRATIVE LAW

The words "transition" and "preparation" succinctly describe the activities of the State Administrative Law Committee during the past year. The Committee has been busily engaged in the transition from its committee status to a transformed and expanded special Division of the Section. It has also made preparation for future activities of the Division to publicize the Revised Model State Administrative Procedure Act and to coordinate activities leading to the Act's adoption as statutory law in the several states.

The Council of the Administrative Law Section decided at its Annual Meeting in St. Louis to establish a Division of State Administrative Law. The necessary resolutions to create the Division and proposed By-Laws for the Division were adopted by the Council at its December, 1961 Meeting. This transformation appeared to be necessary because of the ever-increasing importance of administrative law problems at the state level and because of increasing interest in this field. Creation of the Division is not only in recognition of this but is also in recognition of the fact that a larger organizational base permitting the multiple committees within the group is desirable and necessary to meet the burden of expanded activities of the Division.

Foremost among the expanded activities of the Division will be its program to publicize the newly adopted Model State Administrative Procedure Act and to coordinate consideration of that Act as a prototype for actual legislative programs in the various states. The Model Act can be utilized in quite a number of areas which will not only publicise its features but will also further an objective of the Division to extend the study of this field of law among all members of the Bar. This Act can be used for comparative study with existing law by local bar committees seeking legislative revision. It can also be used as source material and as the basis for workshops at State and Regional Bar meetings. Because of the timeliness of the subject, the Model Act would be an appropriate subject matter for articles in bar journals and law reviews.

An overwhelmingly favorable reaction has been received by the Committee to the creation of the Division. Many states have shown interest in the proposed program for the Division; this interest has ranged from the creation for the first time of committees of state bar associations on administrative law all the way to the more important step of intelligently planned campaigns for the adoption of all or part of the Model Act in their respective states.

This interest of state bars and lawyers generally suggests the desirability of the Division's having regional committees as opposed to the more usual functional committees of the Sections. Such regional committees can coordinate legislative activities in their respective states and plan and execute programs for Regional and State Bar Meetings. The membership of these committees should include, as a minimum, all members of the American Bar Association Administrative Law Section who are members of the Division and chairmen of State Bar Committees on Administrative Law in states embraced within the District. Consequently, it is anticipated that at the outset the Division will have 14 committees corresponding to the districts from which members of the Board of Governors are to be elected and an Executive Committee consisting of the three officers of the Division and the Chairmen of the District Committees.

Frederic L. Kirgis, *Chairman*
Committee on State Administrative Law

PROGRESS IN JUDICIAL REVIEW OF AGENCY DECISIONS

During the year the work of the Committee embraced three overall categories: (1) the submission of views of the Committee with respect to the Judicial Review aspects of certain legislation before the Congress; (2) continuation of the study by the Subcommittee headed by Ernest Jennes of Washington, D.C. with respect to problems pertaining to dual appellate procedures under the Federal Communications Act; (3) study of developments in the field of judicial review of action of State and Federal Administrative Agencies.

With respect to the first category, the Committee had occasion to consider the Judicial Review aspects of proposed legislation such as that embodied in S. 1235, which contemplates reorganization of the Court of Claims of the United States. The views of the Committee with respect to the creation of a proposed Appellate Branch of the U.S. Court of Claims were presented to the Section Chairman.

Similarly through the Committee Chairman the Committee presented views with respect to possible special status under proposed legislation pertaining to the Patent laws in relation to certain types of drugs. Under S. 1552, inter alia the Secretary of Health, Education and Welfare would play a prominent role, supplementing the functioning of the United States Patent Office. The Judicial Review aspects of such proposed legislation was the subject of a conference between the Committee Chairman and the Section Chairman.

During the prior year a Subcommittee under the Chairmanship of Ernest Jennes of Washington, D.C. prepared a very thorough report pertaining to problems arising out of dual appellate procedures under the Federal Communications Act. Mr. Jennes is engaged in exploring the various aspects of this matter with the Chairman of the Section's Committee on the Federal Communications Commission. Such investigation from an overall point of view will certainly be productive.

Members of the Committee on Judicial Review, particularly within the field of their own experience and practice, have presented reports on developments with respect to judicial review of actions by certain Federal and State Administrative Agencies.

Excellent reports were submitted to the Chairman by the following:

Paul D. Miller and William W. Golub of New York City—Securities and Exchange Commission; Richard L. Perry of Washington, D.C.—Federal Trade Commission; Ernest Jennes, Washington, D.C.—Federal Communications Commission (previously filed); Ruth Kessler Toch, Albany, New York; George H. Hart, Seattle, Washington; Francis W. Madigan, New York City and Benedict Mangano, Albany, N.Y.—State Administrative Agencies.

Since many decisions were involved, to present them in summary form would unduly protract this Report. Accordingly, they will be referred to with topical reference and citation. This will enable interested attorneys to examine the decisions which are of special interest to them. The full reports of the individual members are being retained as part of the files of the Committee on Judicial Review. Reference is here made to recent decisions in the field of Judicial Review of Administrative Agency action.

SECURITIES AND EXCHANGE COMMISSION

Hennesey v. *Securities and Exchange Commission,* 285 F. 2d 511 (3d Cir. 1961)—under the Investment Company Act, standing of party seeking petition for review of an order of the SEC, where the party had intervened, presented objections at the opening of the hearing but did not present evidence at the protracted hearing. *Samuel B. Franklin & Co.* v. *Securities and Exchange Commission,* 290 F. 2d 719 (9th Cir. 1961), cert denied 368 U.S. 891 (1961)—under Section 10 (c) of the Administrative Procedure Act, the timely filing of a petition for agency reconsideration tolled the prescribed period for an appeal to the Circuit Court of Appeals. *Associated Securities Corp.* v. *Securities and Exchange Commission,* 283 F. 2d 773 (10th Cir. 1961)—indication of the conditions under which stay of an administrative agency order may be granted by a Court on Judicial Review. *Dyer* v. *Securities and Exchange Commission,* 287 F. 2d 773, 289 F. 2d 242, 290 F. 2d 541 (8th Cir. 1961)—judicial review of actions by SEC with respect to proxy solicitation material and status of hearing with respect to same when the granting of such subject to discretion of Commission. *Dyer* v. *Securities and Exchange Commission,* 290 F. 2d 534 (8th Cir. 1961)—under the Public Utility Holding Company Act, refusal of the Commission to consider objection to an order which had not been presented before the Commission. *Dyer* v. *Securities and Exchange Commission,* 291 F. 2d 774 (8th Cir. 1961)—lack of jurisdiction in the Court on judicial review to compel the Commission to exercise investigative power committed to the Commission's absolute discretion. *N. Sims Organ & Co., Inc.* v. *Securities and Exchange Commission,* 293 F. 2d 78 (2d Cir. 1961), cert. denied 368 US 968 (1962)—consideration of issue of whether public notice with respect to proceeding to revoke a broker-dealer registration constituted prejudgment of the issues by the Commission. *Cities Service Co.* v. *Securities & Exchange Commission,* 257 F. 2d 926 (3rd Cir., 1958)—issue of res judicata.

FEDERAL TRADE COMMISSION

Crown Zellerbach Corp. v. *FTC,* 296 F. 2d 800 (9th Cir. 1961)—review of order of divestiture; disapproval of "quantitative substantiality" test; effect of receipt by hearing examiner in evidence of a survey with numerous errors and discrepancies, when no weight was attached to such survey by the hearing examiner in his decision. *Erie Sand & Gravel Co.* v. *FTC,* 291 F. 2d (3rd Cir. 1961)—competitive effects of merger; order of divestiture; remand because of basic factual errors in defining the revelant product and the geographical markets. *Exquisite Form Brassiere, Inc.* v. *FTC,* 5 CCH Trade Reg. PP 70,157 (D.C. Cir. 1961) and *Sun Oil Co.* v. *FTC,* 294 F. 2d 465 (5th Cir. 1961)—judicial review of applicability of "the meeting of competition defense." *Swanee Paper Corp.* v. *FTC,* 291 F. 2d 833 (2d Cir. 1961), cert. denied, 369 US 602—under Clayton Act Finality Act requirement by Court of some relation between the facts found and breadth of the order issued by the Commission; *FTC* v. *Henry Broch & Co.,* 368 US 491 (1962)—judicial review of extent to which the Commission order to cease and desist from making payments of allegedly illegal brokerage under Section 2(c) of the Robinson-Patman Act should be limited by virtue of the number of brokerage transactions upon which the Commission's order was based. *Grand Union Co.* v. *FTC,* 5CCH Trade Reg. PP 70,224 (2nd Cir. 1962)—on judicial review modification of broad cease and desist order under Section 5 of the Federal Trade Commission Act, confining order to the particular practice found to violate the statute. *Asheville Tobacco Board of Trade* v. *FTC,* 294 F. 2d 619 (4th Cir. 1961)—on judicial review, modification of an order under Section 5 of the Federal Trade Commission Act because the general standards set forth in the Commission's modified order would improperly transfer to the Court, upon a proceeding for enforcement, questions of administrative judgment which Congress intended to be determined by the Commission itself. *Art National Manufacturers Distributing Co.* FTC, 298 F 2d 476 (2nd Cir. 1962)—no reversible error when first hearing examiner died after hearing the testimony of eight witnesses and another hearing examiner was appointed to conclude the hearing. *Bankers Securities Corp.* v. *FTC,* 297 F. 2d 403 (3rd Cir. 1961)—on a false and misleading advertising issue, on judicial review court limited scope of Commission's order to advertising practices by the store which ran the challenged advertisement, declining to extend it to other stores in which the petitioner held stock interest. *Travelers Health Association* v. *FTC,* 298 F. 2d 820 (8th Cir. 1962) with respect to Commission's order regulating advertising by an insurance company, on judicial review the Court affirmed the Commission's cease and desist order but refused to apply it to two States in which the insurance company was authorized to do business. *Exposition Press Inc.* v. *FTC,* 295 F. 2d 869 (2d Cir. 1961) affirmation of cease and desist order against representations charged to be misleading or deceptive; the Court attached great weight to the Commission's factual inferences, ruling that actual testimony of customers that they had been deceived is not required. *Holland Furnace Co.* v. *FTC,* 295 F. 2d 302 (7th Cir. 1961)—on judicial review Court held petitioner had received a fair hearing despite fact hearing examiner had interrupted petitioner's attorneys and witnesses 573 times during 88 days of hearing, the Court ruling the examiner had conducted the hearing fairly. *United States Retail Credit Ass'n* v. *FTC,* 5 CCH Trade Reg. PP 70,253 (4th Cir. 1962)—on judicial review court concluded no error created by Commission setting aside hearing examiner's decision and making its own findings of fact when the Commission's findings were supported by substantial evidence, when the evidence was not conflicting, and no issues of credibility of witnesses were involved. *Hoving Corp.* v. *FTC,* 290 F. 2d 803 (Cir. 1961)—in rule making under Fur Products Labeling Act regulations were held valid despite a purely technical flaw of failing to include within the rules themselves a concise general statement of the basis and purpose thereof. The Court noted that the basis and purpose of the rules were obvious from the legislation itself and that the entire trade was fairly apprised of them by the procedure followed. *FTC* v. *Ace Books*

Inc., 5 CCH Trade Reg. PP 70,164 (S.D., N.Y. 1961)—on judicial review the Court upheld Commission's authority to issue subpoenas in aid of investigation into possible violations of the Clayton Act under Section 9 of the Federal Trade Commission Act. However, the Court required the investigation be conducted at respondent's offices to obviate the need for removing voluminous records from its place of business where they were needed.

STATE ADMINISTRATIVE AGENCIES

Washington State: *State ex rel Jehovah's Witnesses* v. *Wenatchee,* 50 Wn. (2d) 378, 312 P. (2d) 195 (1957)—presumption that official acts of public officers have been regularly and legally performed is inapplicable to zoning boards. A zoning board has the ultimate burden of proving that its actions are not arbitrary and capricious. *In re Flynn,* 52 Wn. (2d) 589, 328 P. (2d) 150 (1958)—on appeal from an administrative action revoking a license to practice dentistry in the state of Washington, matter remanded to Director of Licenses for the imposition of an appropriate disciplinary penalty. New York: *Matter of Miller* v. *National Cabinet Co.,* 8 N.Y. 2d 277; *Matter of Connors* v. *Heywood Floor Company,* 14 A.D. 2d 947; *Matter of Cole* v. *Pitney Dental Laboratory,* 11 A.D. 2d 823—judicial review of decisions of the Workmen's Compensation Board. New York: *Application of Sculetti,* 220 N.Y. Supp. 2nd 506—on judicial review rejection of application for license found premised upon reasonable exercise of discretion, *Dover* v. *Dumpson,* 220 N.Y. Supp. 2d 102—determination by administrative agency of violations by Civil Service employee and his dismissal upheld as sustained by substantial evidence, the Court refusing to substitute its judgment for that of the administrative body, citing *Humphrey* v. *State Insurance Fund,* 298 N.Y. 327. *Application of Frank,* 218 N.Y. Supp. 2d 208, 14 A.D. 2d 139—on judicial review of determination by Secretary of State re renewal of real estate broker's license, Court drew distinction between substantial evidence and a mere scintilla of evidence, citing *Stork Restaurant, Inc.* v. *Boland,* 282 N.Y. 256. *Hiscox* v. *Levine,* 216 N.Y. Supp. 2d 801—determination of Planning Board which gave a developer the right to build homes on 63 acres of land zoned for one acre, in accordance with regulations applicable to ½ acre. The Court pointed out that the power to amend the zoning regulations of the land did not carry with it the power to change the zoning district of the land.

The cooperation of the members of the Committee on Judicial Review has been excellent. It is strongly recommended that the practice of reviewing developments in the field of judicial review of administrative agencies should be continued along with the special work of the Committee with respect to legislative proposals involving changes in judicial review principles, as well as work on other matters upon which the Committee may be asked to express its views by the Section Chairman or other appropriate persons.

JOHN F. DONELAN, *Chairman*
Committee on Judicial Review

SPECIALTIES IN LAW PRACTICE

The ABA Special Committee on Recognition and Regulation of Specialties in Law Practice requested by letter of November 6, 1961, the cooperation of the Section of Administrative Law in the development of a certificate of special proficiency for administrative law practice. Pursuant to this request, the Chairman established an Ad Hoc Committee on Specialties in Law Practice composed of the undersigned.

This committee has reviewed the matter and has concluded that it is impractical and unwise for the ABA to undertake the tremendous task of evaluating qualifications of lawyers for the purpose of determining competence in specialized areas of law. For this reason the committee does not believe that the Section should attempt to propose to the Association standards by which to test the special competence of lawyers engaged in administrative law practice.

On the other hand, the committee does recognize that designation of special interest in approved legal directories, such as Martindale-Hubbell, might have some usefulness. Members of the ABA who desire to do so might be permitted to indicate in legal directories specialization in a particular field or fields of practice in any area embraced by one or more Sections of the Association.

The committee believes that such permission should be based upon two factors:

(a) Membership in the Section or Sections of the Association which embraces his specialty or specialties, and
(b) His own statement that he is actively engaged in such specialty or specialties as a significant part of his practice.

A lawyer who meets these minimal requirements should be entitled to the permission to use a symbol, such as a cross inside the familiar ABA triangle, followed by the name of his specialty or specialties.

This rather simple method of certification would encourage lawyers to attain greater proficiency in the area of their chosen specialty by actively participating in the work of the appropriate Section of the Association. It would facilitate to some extent the reference of business by enabling lawyers to ascertain by simple inspection of the appropriate legal directory the men in a distant city who specialize in the type of business to be forwarded.

> *Recommendation:* The Section recommends to the House of Delegates that the Association should not go forward with proposals of certification of proficiency in practice but that if the Association does so the Association's action should be limited to the proposal set out in the above report of the Section's Ad Hoc Committee on Specialties in Law Practice.

WHITNEY R. HARRIS, *Chairman*
Ad Hoc Committee on Specialties in Law Practice

NOMINATIONS FOR 1962–3

Undersigned Committee on Nominations hereby reports as nominations for offices in the Section of Administrative Law for the term commencing at the adjournment of the 1962 meeting as follows:

Chairman, Frank E. Cooper of Detroit, Michigan.
Chairman-Elect, C. Roger Nelson of Washington 6, D.C.
Secretary, Elizabeth C. Smith of Washington, D.C.

For the Council, full term:

Whitney R. Harris of Dallas, Texas.
Robert L. McCarty of Washington, D.C.
Victor G. Rosenblum of Evanston, Illinois.
Patricia H. Collins of Washington, D.C.

For Section Delegate to House of Delegates for the term ending 1964:

Donald C. Beelar of Washington, D.C.

FRANK C. NEWMAN
ASHLEY SELLERS
JOHN W. CRAGUN, *Chairman*
Committee on Nominations